A

Public Prosecutor v Sabudin bin Mohd Salleh

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA(R)(A)-4–09 OF 2022
MUNIANDY KANNYAPPAN J
9 JUNE 2024

C *Criminal Procedure — Appeal — Appeal against acquittal and discharge — Accused charged for corruption under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') — Sessions court acquitted and discharged accused at end of prosecution's case — Decision reversed by High Court — Sessions court continued to hear defence of accused and once more* D *acquitted and discharged accused — Extent/limit of court's appellate jurisdiction — Whether amendment of charges altered narrative of prosecution — Whether presumption under s 50(1) of MACC Act applied — Whether s 52 of MACC Act applicable to testimony of witnesses — Whether defence of accused rebutted presumption of law — Courts of Judicature Act 196 s 26 — Malaysian* E *Anti-Corruption Commission Act 2009 ss 17(a), 50(1) & 52*

This was an appeal by the public prosecutor ('the prosecution') against the decision of the sessions court judge ('SCJ') who had acquitted and discharged the respondent ('the accused') from charges for two offences under s 17(a) of F the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and alternatively for offences under s 165 of the Penal Code. The principal charges pertained two different payments for job assignments to the company Dusari Niaga Sdn Bhd ('DNSB') for two different projects. The giver of the corrupt money to the accused in the projects was one Wong May Kuan ('SP3') who was G also the complainant. Allegation in the charges was that the contract for works was procured via bribe paid to the accused. The principal charges were subsequently amended. The accused was acquitted and discharged of the charges at the end of the case of prosecution, as it was decided by the SCJ that the prosecution had not made out a prima facie case against the accused. H Simply because SP3 being giver of the bribe was found not to be a credible witness. On appeal to the High Court, decision by the SCJ was reversed by High Court judge 1 ('HCJ 1') who had proceeded to order the accused to defend himself to the amended principal charges preferred against him and for the case of defence to proceed to trial at the sessions court. The SCJ who had I heard the case of prosecution had continued to hear the defence of the accused. The SCJ at conclusion of the trial, decided that testimony of the accused person and his witnesses had remained unshaken by the prosecution, thus a reasonable doubt had been raised, not only on the act of giving the bribe, but also that the bribery did not take place. She then acquitted and discharged the

accused from the amended charges for offences of corruption. Hence, this appeal. With regard to the first charge, the accused contended that the amendment was a material alteration and the narrative of the prosecution had changed. As for the second charge, it was contended by the accused to have a taint of mala fide or bad faith by the prosecution when the charge was preferred against him. The prosecution argued that it had been proven that the accused had corruptly received gratification a cash sum of RM200,000 from SP3. By virtue of that, the SCJ was directed by HCJ 1 to hear the case of the defence and she was not at all in a position to revisit that finding by then HCJ 1. Albeit doing so, the SCJ had paid lip service to the testimony of SP2, who had testified that he had loaned the amount of RM200,000 to SP3 in order for her to pay the accused, which stood uncontroverted until the end of the trial. Further, the accused was unable to rebut the proof by the prosecution that he had indeed received the said gratification of RM200,000 in cash from SP3 corruptly as inducement for the issuance of the contract for works to DNSB. In the absence of any fresh evidence to the contrary by the accused, the presumption under s 50(1) of the MACC Act applicable against him stood unrebutted. In the course of hearing the appeal, parties had also raised the issue on the extent and/or limit of the court's appellate jurisdiction. Pivotal question raised was if the entire case of the accused was before the court for hearing pursuant to s 26 of the Courts of Judicature Act 1964 ('the CJA').

Held, allowing the appeal:

(1) Since the first appeal involving the decision of the SCJ to acquit and discharge the accused at the end of the case of prosecution had been determined by the HCJ 1, it stayed. Thus, his decision for the accused to enter on his defence, remained unaltered, which could only be revisited by the Court of Appeal when the entire case of the accused including this appeal reached there for a final determination. The present appeal was only on the decision by SCJ who had acquitted and discharged the accused at the end if his trial after having heard and considered his defence, pursuant to the order by HCJ 1. That would be regardless of this criminal appeal being a rehearing pursuant to s 26 of the CJA. Since both HCJ 1 and this court were of coordinate jurisdiction, it would be jurisdictionally incorrect for this court to revisit, re-assess and re-evaluate his decision (see paras 34–36).

(2) The amendment to the charges did not materially alter the narrative of the prosecution, which was that the bribe paid by SP3 was in fact for the purpose of securing the contract for works for DNSB which was supported by the work permit issued. The materiality of the allegation against the accused which formed the foundation of the charge, remained intact, which was that the accused had received the gratification from SP3 in order for DNSB to be awarded the contract for works, as it was ultimately awarded, resulting from her act of bribing the accused.

Likewise, the alterations made did not prejudice the accused, as it was supported by evidence from SP3, her story corroborated in material particulars by SP2, whose testimony was material as he undertook the contract for works (see para 48).

(3) When arriving at her finding at the end of the case of defence, the SCJ did not pay heed to the order of the HCJ 1 that a prima facie case had been established and therefore she had to only consider the defence of the accused vis the presumption of law pursuant to s 50(1) of the MACC Act. The SCJ had further erred when she did not consider the law that in view of the presumption applicable against him, the accused bore a higher burden of proof to rebut the said presumption on a balance of probabilities (see para 73).

(4) An error of law was committed by the SCJ when she misdirected herself on the applicable law pertaining evidence of SP2 and SP3 whom shall not be regarded as an accomplice pursuant to s 52(1)(a) of the MACC Act. Although SP3 who was giver of the bribe, it came about because of the demand made by the accused for a sponsorship when SP3 went to see him to complain that she had not obtained the contract for works yet. SP2 was merely ferrying SP3 to the port of parting with the gratification to be paid to the accused and he was the person who had loaned the monies to SP3 in order to corruptly gratify the accused person (see para 73).

(5) The prosecution was successful in proving beyond reasonable doubt that the accused had abused his position by acting to his own advantage, by receiving pecuniary benefit as inducement for him to approved the contract for works to SP3 who was representing the entity DNSB. Thus, in law, he had committed offences of corruption. In view of the bare denial and afterthought explanation by the accused, the fact that DNSB was awarded the contract for works after the gratification was paid by SP3 to him stood uncontroverted. Thus, the presumption of law applicable against him also remained unrebutted. The order of discharge and acquittal was set aside and substituted with a finding of guilty and conviction on the two charges preferred against him under s 17(a) of the MACC Act, pursuant to s 316(a) of the CPC (see paras 75–76).

(6) The accused was sentenced to: (a) imprisonment for a period of four years for the first charge; (b) imprisonment for a period of four years for the second charge; and (c) penalty for the corrupt amount received, which was the amount of RM200,000, to be five times of that amount, adding up to RM1m. Non-payment of the penalty sum would lead to a default sentence for an additional period of four years imprisonment. All terms of imprisonment ordered was to take effect concurrently but the default term of imprisonment for non-payment of penalty was to run consecutive to the term of four years imprisonment ordered. A stay of

execution of the sentence pending appeal against the finding of guilty, conviction and sentence was also granted (see paras 86–87).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pendakwa raya ('pendakwaan') terhadap keputusan hakim mahkamah sesyen ('HMS') yang telah membebaskan dan melepaskan responden ('tertuduh') daripada pertuduhan bagi dua kesalahan di bawah s 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') dan sebagai alternatif bagi kesalahan di bawah s 165 Kanun Keseksaan. Pertuduhan utama berkaitan dengan dua pembayaran berbeza untuk tugasan kerja kepada syarikat Dusari Niaga Sdn Bhd ('DNSB') untuk dua projek berbeza. Pemberi wang rasuah kepada tertuduh dalam projek tersebut adalah Wong May Kuan ('SP3') yang juga pengadu. Dakwaan dalam pertuduhan adalah bahawa kontrak kerja diperoleh melalui rasuah yang dibayar kepada tertuduh. Pertuduhan utama kemudiannya dipinda. Tertuduh dibebaskan dan dilepaskan daripada pertuduhan pada akhir kes pendakwaan, kerana diputuskan oleh HMS bahawa pendakwaan tidak berjaya membuktikan kes prima facie terhadap tertuduh. Ini kerana SP3 sebagai pemberi rasuah didapati tidak boleh dipercayai sebagai saksi. Atas rayuan ke Mahkamah Tinggi, keputusan HMS dibatalkan oleh hakim Mahkamah Tinggi 1 ('HMT1') yang telah memerintahkan tertuduh membela diri terhadap pertuduhan utama yang dipinda dan untuk kes pembelaan diteruskan di mahkamah sesyen. HMS yang telah mendengar kes pendakwaan telah meneruskan untuk mendengar pembelaan tertuduh. HMS pada akhir perbicaraan, memutuskan bahawa keterangan tertuduh dan saksi-saksinya tidak tergugat oleh pendakwaan, maka keraguan munasabah telah timbul, bukan sahaja pada tindakan memberi rasuah, tetapi juga bahawa rasuah tidak berlaku. Beliau kemudian membebaskan dan melepaskan tertuduh daripada pertuduhan yang dipinda bagi kesalahan rasuah. Oleh itu, rayuan ini. Berkenaan dengan pertuduhan pertama, tertuduh berhujah bahawa pindaan tersebut adalah perubahan material dan naratif pendakwaan telah berubah. Bagi pertuduhan kedua, tertuduh berhujah bahawa terdapat niat jahat atau mala fide oleh pendakwaan apabila pertuduhan tersebut dikemukakan terhadapnya. Pendakwaan berhujah bahawa telah terbukti bahawa tertuduh telah menerima suapan wang tunai sebanyak RM200,000 daripada SP3. Oleh itu, HMS diarahkan oleh HMT1 untuk mendengar kes pembelaan dan beliau tidak berada dalam kedudukan untuk menilai semula keputusan tersebut. Walaupun begitu, HMS telah paid lip service kepada keterangan SP2, yang telah memberi keterangan bahawa dia telah meminjamkan jumlah RM200,000 kepada SP3 untuk membayar tertuduh, yang tidak dipertikaikan sehingga akhir perbicaraan. Selain itu, tertuduh tidak dapat menolak bukti oleh pendakwaan bahawa dia memang telah menerima suapan tersebut sebanyak RM200,000 secara tunai daripada SP3 sebagai dorongan untuk pemberian kontrak kerja kepada DNSB. Dalam ketiadaan sebarang keterangan baharu yang bertentangan oleh tertuduh, anggapan di bawah s 50(1) Akta SPRM yang terpakai terhadapnya

A tidak dapat disangkal. Semasa mendengar rayuan, pihak-pihak juga telah membangkitkan isu mengenai takat dan/atau had bidang kuasa rayuan mahkamah. Persoalan penting yang dibangkitkan adalah jika keseluruhan kes tertuduh dihadapkan ke mahkamah untuk dibicarakan menurut s 26 Akta Mahkamah Kehakiman 1964 ('AMK').

B

Diputuskan, membenarkan rayuan:

(1) Memandangkan rayuan pertama yang melibatkan keputusan HMS untuk membebaskan dan melepaskan tertuduh pada akhir kes pendakwaan telah diputuskan oleh HMT1, ia kekal. Oleh itu, keputusannya untuk tertuduh membela diri, kekal tidak berubah, yang hanya boleh disemak semula oleh Mahkamah Rayuan apabila keseluruhan kes tertuduh termasuk rayuan ini sampai ke sana untuk penentuan akhir. Rayuan ini hanya mengenai keputusan oleh HMS yang telah membebaskan dan melepaskan tertuduh pada akhir perbicaraannya selepas mendengar dan mempertimbangkan pembelaannya, menurut perintah oleh HMT1. Ia akan berlaku tanpa mengira rayuan jenayah ini adalah perbicaraan semula menurut s 26 AMK. Oleh kerana kedua-dua HMT1 dan mahkamah ini mempunyai bidang kuasa yang sama, adalah tidak betul dari segi bidang kuasa untuk mahkamah ini menilai semula dan menyemak semula keputusannya (lihat perenggan 34–36).

(2) Pindaan kepada pertuduhan tidak mengubah naratif pendakwaan secara material, iaitu bahawa rasuah yang dibayar oleh SP3 adalah untuk tujuan mendapatkan kontrak kerja untuk DNSB yang disokong oleh permit kerja yang dikeluarkan. Materialiti dakwaan terhadap tertuduh yang membentuk asas pertuduhan, kekal utuh, iaitu bahawa tertuduh telah menerima suapan daripada SP3 untuk DNSB dianugerahkan kontrak kerja, kerana yang akhirnya dianugerahkan, hasil daripada tindakannya memberi rasuah kepada tertuduh. Begitu juga, pindaan yang dibuat tidak memprejudiskan tertuduh, kerana ia disokong oleh keterangan daripada SP3, ceritanya disokong dalam butiran material oleh SP2, yang keterangannya adalah material kerana dia menjalankan kontrak kerja (lihat perenggan 48).

(3) Apabila tiba pada penemuannya pada akhir kes pembelaan, HMS tidak memberi perhatian kepada perintah HMT1 bahawa kes prima facie telah dibuktikan dan oleh itu beliau hanya perlu mempertimbangkan pembelaan tertuduh berbanding anggapan undang-undang menurut s 50(1) Akta SPRM. HMS juga telah terkhilaf apabila tidak mempertimbangkan undang-undang bahawa memandangkan anggapan yang terpakai terhadapnya, tertuduh mempunyai beban bukti yang lebih tinggi untuk menyangkal anggapan tersebut berdasarkan imbangan kebarangkalian (lihat perenggan 73).

(4) Kesilapan undang-undang telah dilakukan oleh HMS apabila salah arah

mengenai undang-undang yang terpakai berkaitan keterangan SP2 dan SP3 yang tidak boleh dianggap sebagai rakan sejenayah menurut s 52(1)(a) Akta SPRM. Walaupun SP3 yang merupakan pemberi rasuah, ia berlaku kerana permintaan yang dibuat oleh tertuduh untuk mendapatkan tajaan apabila SP3 pergi menemuinya untuk mengadu bahawa dia belum mendapat kontrak kerja. SP2 hanya membawa SP3 ke tempat pemberian suapan kepada tertuduh dan dia adalah orang yang telah meminjamkan wang kepada SP3 untuk memberi suapan kepada tertuduh (lihat perenggan 73).

(5) Pendakwaan berjaya membuktikan tanpa keraguan munasabah bahawa tertuduh telah menyalahgunakan kedudukannya dengan bertindak untuk kepentingannya sendiri, dengan menerima manfaat kewangan sebagai dorongan untuk meluluskan kontrak kerja kepada SP3 yang mewakili entiti DNSB. Oleh itu, dari segi undang-undang, dia telah melakukan kesalahan rasuah. Memandangkan penafian kosong dan penjelasan yang difikirkan semula oleh tertuduh, fakta bahawa DNSB dianugerahkan kontrak kerja selepas suapan dibayar oleh SP3 kepadanya tidak dipertikaikan. Oleh itu, anggapan undang-undang yang terpakai terhadapnya juga kekal tidak dapat ditolak. Perintah pelepasan dan pembebasan dibatalkan dan digantikan dengan keputusan bersalah dan sabitan atas dua pertuduhan yang dikemukakan terhadapnya di bawah s 17(a) Akta SPRM, menurut s 316(a) Kanun Prosedur Jenayah (lihat perenggan 75–76).

(6) Tertuduh dijatuhi hukuman: (a) penjara empat tahun bagi pertuduhan pertama; (b) penjara selma empat tahun bagi pertuduhan kedua; dan (c) denda bagi jumlah rasuah yang diterima, iaitu sebanyak RM200,000, menjadi lima kali ganda jumlah tersebut, berjumlah RM1 juta. Kegagalan membayar jumlah denda akan menyebabkan hukuman penjara tambahan empat tahun. Semua tempoh penjara yang diperintahkan akan berkuat kuasa serentak tetapi tempoh penjara tambahan bagi kegagalan membayar denda akan berjalan berturut-turut dengan tempoh penjara empat tahun yang diperintahkan. Penangguhan pelaksanaan hukuman sementara menunggu rayuan terhadap keputusan bersalah, sabitan dan hukuman juga diberikan (lihat perenggan 86–87).]

Cases referred to

Azmi bin Osman v PP and another appeal [2016] 3 MLJ 98; [2015] 9 CLJ 845, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Che Din bin Ahmad v PP [1976] 1 MLJ 289 (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)

Dato' Haji Azman bin Mahalan v PP [2007] 4 MLJ 142, HC (refd)

Dickson Levy a/l Maria George v PP [2018] MLJU 98; [2018] 1 LNS 135, CA (refd)
Goh Han Heng v PP [2003] SGHC 226; [2003] 4 SLR 374, HC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Mohd Khir bin Toyo v PP [2015] 5 MLJ 429, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Noor Azman bin Abidin v PP [2013] MLJU 703; [2014] 1 CLJ 58, CA (refd)
PP v Dato' Hj Azman bin Mahalan [2010] 6 MLJ 833; [2010] 6 CLJ 34, CA (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Ma' Arif [1969] 2 MLJ 65 (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273; [1980] 1 MLRA 3, FC (refd)
Pendakwa Raya v Sanin bin Othman [2010] MLJU 1283, CA (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Teja Singh & Mohamed Nasir v PP [1950] 1 MLJ 71 (refd)
Woolmington v DPP [1935] AC 462, HL (refd)

Legislation referred to

Anti-Corruption Agency Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009) s 44
Courts of Judicature Act 1964 ss 3, 26
Criminal Procedure Code ss 158, 173(m)(i), (m)(iii), 283, 307(1), 311, 316(a)
Evidence Act 1950 ss 60(1)(a), (1)(b), 137, 138, 146(a)
Federal Constitution art 145(3)
Malaysian Anti-Corruption Commission Act 2009 ss 17(a), 24(1), (1)(a), (1)(b), 50(1), 52, 52(1)(a)
Penal Code s 165
Subordinate Courts Act 1948

Wan Shaharuddin bin Wan Ladin (with Natrah Fareha bt Rahmat) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
K Theivaendran (with Y Sheelan) (Desmond Ho & Assoc) for the respondent.

Muniandy Kannyappan J:

PREFACE

[1] This appeal by the public prosecutor ('PP') is against the decision of the sessions court judge ('SCJ') who had acquitted and discharged the accused from charges for offences of corruption committed by him on 9 June 2018 and 17 January 2019. Parties are referred to in this judgment as the prosecution and accused, respectively the appellant and respondent to this appeal.

[2] This court in its exercise of appellate jurisdiction had heard the appeal and decided to reverse the decision made by the SCJ, thus substituting it with an order of conviction pursuant to s 316(a) of the Criminal Procedure Code (CPC/Act 593). Consequent to that this court had sentenced the accused, who was respondent to this appeal to a period of four years imprisonment and he was ordered to pay a fine of RM1m pursuant to s 24(1)(a) and (b) of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act/Act 694). The said sentence was passed after having heard the plea in mitigation of the accused, advanced by his counsel. He was accorded the right to be heard before incarceration and punished with payment of fine, according to law.

[3] Parties were heard on 19 May 2023; 2 June 2023; and decision was delivered on 27 July 2023. At the request by counsel for the accused, submission on mitigation and sentence was heard on 15 August 2023. Broad grounds of judgment were read out to parties in open court. Before reading out the broad grounds, parties were advised on the following:

(a) to have kept their written submission short, precise and clear and not to stray away from the pivotal issues raised in the appeal so as to avoid getting lost into the thicket and also belaboring the court with unnecessary details and repetition;

(b) issues on credibility of witnesses could be tagged on to the finding of fact made by the trial judge;

(c) an appeal against the decision of the sessions court judge ('SCJ') has to be invariably on the commission of an error of law or fact or both, thus it is advisable for parties to be specific on those errors and submit accordingly (see: s 307(1) of the CPC);

(d) to restrain using intemperate language and colloquial phrases when commenting on the judgment by the SCJ, albeit she having committed errors of fact, law or both;

(e) as the SCJ had embarked on judicial fact-finding, rightly or wrongly, it is only proper and appropriate to comment and submit on those errors

made, by adopting temperate language in terms of the law and avoid references in an insolent manner;

(f) the SCJ when delivering her judgment after a full trial had arrived at fact finding after having heard the witnesses for the prosecution and defence and had evaluated their evidence, rightly or wrongly before deciding to acquit and discharge the accused person;

(g) she was merely embarking on her judicial function, exercising her discretion within the parameters of the law found in the Federal Constitution (FC), Subordinate Courts Act 1948 (SCA/Act 92), MACC Act, Evidence Act 1950 (EA/Act 56) and other requisites. As she had acquitted the accused person, she had her reasons to do so premised on her evaluation of the evidence;

(h) thus, if the appealing party is dissatisfied with her decision, reference ought to be made to parts of judgment of the SCJ, where it was inconsistent and/or incongruent with the evidence proffered in the case. It could be a case where she may have missed evaluating some salient parts of the evidence tendered in the case or she had either misdirected herself on the facts and law or did not even direct her mind to certain parts of the evidence tendered before arriving at a finding of fact; and

(i) likewise, counsel for the accused when commenting on the conduct of prosecution has to refrain from using colloquial phrases 'like, playing games', 'shifting shadows', 'inflicted a serious wound on itself', 'thin end of the wedge if such fraudsters were enabled to bring the court's processes and the rule of law to its knees', 'subvertive stance' and so forth.

CHARGES

[4] The accused, respondent to this appeal was charged at the Sessions Court Kuala Lumpur on 7 January 2020 for two offences under s 17(a) of the MACC Act 2009 and alternatively for offences under s 165 of the Penal Code (PC/Act 574). The principal charges are:

First charge:

Bahawa kamu pada 9 Jun 2018 bertempat di dalam Kedai Serbaneka 'Treats', Stesen Minyak Petron, MRR2 Bukit Antarabangsa, Lot 18121, Batu 6 1/2 Jalan Lingkaran Tengah 11, 68000 Ampang, dalam daerah Hulu Langat, Selangor, sebagai seorang ejen kepada Dewan Bandaraya Kuala Lumpur (DBKL) yang berjawatan Timbalan Pengarah Kanan (Awam) di Jabatan Kejuruteraan Awam dan Pengangkutan Bandar DBKL telah secara rasuah, memperoleh untuk diri kamu, suatu suapan, iaitu, wang tunai berjumlah RM100,000.00 daripada Wong May Kuan, sub-kontraktor kepada Dusari Niaga yang melaksanakan kerja 'Cadangan Kerja-Kerja Pengisaran dan Penurapan Semula Jalan bagi Bekas Lubang Gali Syarikat Utiliti di sekitar Wilayah Persekutuan Kuala Lumpur untuk Dewan Bandaraya Kuala Lumpur bagi tahun 2018/2020 (2017/A214)' yang mana wang tersebut diberikan secara tunai

oleh Wong May Kuan sebagai upah untuk diri kamu melakukan suatu perkara yang berhubung dengan hal ehwal prinsipal kamu, iaitu memberikan kerja dengan mengeluarkan 3 permit kerja yang berjumlah keseluruhan RM619,053.34 dan ianya dalam pengetahuan kamu adalah bagi maksud untuk mendapat suapan dan dengan itu, kamu telah melakukan suatu kesalahan dibawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum dibawah seksyen 24 (1) Akta yang sama.

Second Charge:

Bahawa kamu pada 17 Januari 2019 bertempat di hadapan kediaman kamu di No 1 Jalan UP 3/6 Ukay Perdana 68000 Ampang, dalam daerah Hulu Kelang, Selangor, sebagai seorang ejen kepada Dewan Bandaraya Kuala Lumpur (DBKL) yang berjawatan Timbalan Pengarah Kanan (Awam) di Jabatan Kejuruteraan Awam dan Pengangkutan Bandar DBKL telah secara rasuah, memperoleh untuk diri kamu, suatu suapan, iaitu, wang tunai berjumlah RM100,000.00 daripada Wong May Kuan, sub-kontraktor kepada Dusari Niaga yang melaksanakan kerja 'Cadangan Kerja-Kerja Pembaikan dan Menaiktaraf Bebendul dan Siarkaki di Lorong Ceyon (belakang Bangunan Boustead) Kuala Lumpur dan sekitarnya yang mana wang tersebut telah diberikan secara tunai oleh Wong May Kuan sebagai upah untuk diri kamu melakukan suatu perkara yang berhubung dengan hal ehwal prinsipal kamu, dan ianya dalam pengetahuan kamu adalah bagi maksud untuk mendapat suapan dan dengan itu, kamu telah melakukan suatu kesalahan dibawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum dibawah seksyen 24(1) Akta yang sama.

[5] The substance of the above two charges are:

(a) as for the *first charge* — on 9 June 2018 at a shop at the petrol kiosk one Wong May Kuan gave the accused cash sum of RM100,000 to obtain three different work permits amounting to RM619,053.34 for a company Dusari Niaga Sdn Bhd;

(b) this was for a specific contract to resurface roads in Kuala Lumpur, referred to as 'Cadangan Kerja-Kerja Pengisaran dan Penurapan Semula Jalan bagi Bekas Lubang Gali Syarikat Utiliti di sekitar Wilayah Persekutuan Kuala Lumpur untuk Dewan Bandaraya Kuala Lumpur bagi tahun 2018/2020 (2017/A214)';

(c) as for the *second charge* — on 17 January 2019 one Wong May Kuan had given the accused a cash sum of RM100,000 at his residence for the purpose of awarding job assignment to the company Dusari Niaga Sdn Bhd; and

(d) the jobs being 'memberikan kerja-kerja Pembaikan dan Menaiktaraf Bebendul dan Siarkaki di Lorong Ceylon (Belakang Bangunan Boustead) Kuala Lumpur & sekitarnya' under a different contract referred to as 'Cadangan Kerja-Kerja Pembaikan dan Menaiktaraf

Bebendul dan Siarkaki di Lorong Ceyon (belakang Bangunan Boustead) Kuala Lumpur dan sekitarnya'.

[6] Therefore, both the charges pertain two different payments for job assignments to the company Dusari Niaga Sdn Bhd ('DNSB') for two different projects. The giver of the corrupt money to the accused is one and the same, one Wong May Kuan who was called as prosecution witness SP3. As for the first charge, it relates to three different work permits worth the sum of RM619,053.34. Allegation in the charges is that the contract for works was procured via bribe paid to the accused.

[7] The two principal charges were subsequently amended and it reads as follows:

First amended charge:

Bahawa kamu pada 9 Jun 2018 bertempat di dalam Kedai Serbaneka 'Treats', Stesen Minyak Petron, MRR2 Bukit Antarabangsa, Lot 18121, Batu 6 1/2 Jalan Lingkaran Tengah 11, 68000 Ampang, dalam daerah Hulu Langat, Selangor, sebagai seorang ejen kepada Dewan Bandaraya Kuala Lumpur (DBKL) yang berjawatan Timbalan Pengarah Kanan (Awam) di Jabatan Kejuruteraan Awam dan Pengangkutan Bandar DBKL telah secara rasuah, memperoleh untuk diri kamu, suatu suapan, iaitu wang tunai berjumlah RM100,000.00 daripada Wong May Kuan, sub-kontraktor kepada Dusari Niaga yang melaksanakan kerja 'Cadangan Kerja-Kerja Pengisaran dan Penurapan Semula Jalan bagi Bekas Lubang Gali Syarikat Utiliti di sekitar Wilayah Persekutuan Kuala Lumpur untuk Dewan Bandaraya Kuala Lumpur bagi tahun 2018/2020 (2017/A214)' yang mana wang tersebut diberikan secara tunai oleh Wong May Kuan sebagai upah untuk diri kamu melakukan suatu perkara yang berhubung dengan hal ehwal prinsipal kamu, iaitu, *mengeluarkan permit kerja kepada Dusari Niaga* dan ianya dalam pengetahuan kamu adalah bagi maksud untuk mendapat suapan dan dengan itu, kamu telah melakukan suatu kesalahan dibawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum dibawah seksyen 24 (1) Akta yang sama. (Emphasis added, showing the amendment.)

Second Amended Charge:

Bahawa kamu pada 17 Januari 2019 bertempat di hadapan kediaman kamu di No 1 Jalan UP 3/6 Ukay Perdana 68000 Ampang, dalam daerah Hulu Kelang, Selangor, sebagai seorang ejen kepada Dewan Bandaraya Kuala Lumpur (DBKL) yang berjawatan Timbalan Pengarah Kanan (Awam) di Jabatan Kejuruteraan Awam dan Pengangkutan Bandar DBKL telah secara rasuah, memperoleh untuk diri kamu, suatu suapan, iaitu wang tunai berjumlah RM100,000.00 daripada Wong May Kuan, sub-kontraktor kepada Dusari Niaga yang melaksanakan kerja *'Cadangan Kerja-Kerja Pengisaran dan Penurapan Semula Jalan bagi Bekas Lubang Gali Syarikat Utiliti di sekitar Wilayah Persekutuan Kuala Lumpur untuk Dewan Bandaraya Kuala Lumpur bagi tahun 2018/2020 (2017/A214)'* yang mana wang tersebut telah diberikan secara tunai oleh Wong May Kuan sebagai upah untuk diri kamu melakukan suatu perkara yang berhubung dengan hal ehwal prinsipal kamu,

iaitu, *mengeluarkan permit kerja kepada Dusari Niaga* dan ianya dalam pengetahuan kamu adalah bagi maksud untuk mendapat suapan dan dengan itu, kamu telah melakukan suatu kesalahan dibawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum dibawah seksyen 24(1) Akta yang sama. (Emphasis added, showing the amendment.)

[8] Surveying the amended charges, the actus reus of the accused having received monies corruptly from one Wong May Kuan as gratification in order for her to secure contract works for a project assigned by Dewan Bandaraya Kuala Lumpur ('DBKL') and mens rea by having the necessary knowledge that the monies were received corruptly, remains the same and unaltered.

[9] The accused is also said to have committed the offences by virtue of his position as *Timbalan Pengarah Kanan (Awam)* di Jabatan Kejuruteraan Awam dan Pengangkutan Bandar (JKAPB) DBKL. Thus, at the material time of commission of the offences, he was acting as the agent of DBKL and the monies he had received corruptly pertains affairs of his principal, being DBKL. Commission of the offences are known in law under the MACC Act. The date and place of offence also remains the same, albeit amendment to the charges.

[10] Therefore, from the outset, there is no prejudice caused to the accused with amendment to the charges made pursuant to s 158 of the CPC read together with art 145(3) of the Federal Constitution on the power of the public prosecutor (PP) to institute prosecution against him. Moreover, the accused was legally represented at all material times, and he was able to advance his defence effectively resulting in a discharge and acquittal at the end of the case of prosecution as well as at the conclusion of his trial. Pursuant to his instructions, his counsel was able to cross-examine the prosecution witnesses vehemently, advance his case to the court via his defence supported by his witnesses, as well as rendering submission at all material time. It is not a case where the accused person was unable to defend himself because of the amendment made to the charges, but on record it is apparent that he was steadfast in the advancement of his defence.

THE FIRST APPEAL

[11] At the prosecution stage of case, six witnesses were called, including the complainant SP3. The accused was acquitted and discharged of the charges at the end of the case of prosecution, as it was decided by the SCJ that the prosecution had not made out a prima facie case against the accused. Simply because the complainant SP3, being giver of the bribe was found not to be a credible witness.

[12] On appeal to the High Court, decision by the SCJ was reversed by High

Court judge 1 (HCJ1) who had proceeded to order the accused to defend himself to the amended principal charges preferred against him and for the case of defence to proceed to trial at the sessions court.

[13] A written judgment by HCJ1 is not mandatory, as decided by the Supreme Court in the case of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 that since the decision was made at the intermediate stage of a criminal trial, it was not a final decision disposing of the rights of parties. An order made for the accused to enter on his defence at the end of the case of prosecution, is also not appealable to the Court of Appeal (COA) pursuant to s 3 of the Courts of Judicature Act 1964 (CJA/Act 91) (see also the case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 (CA).

[14] However, impliedly the decision by HCJ1 denotes that the primary facts as required under s 17(a) of the MACC Act has been proven by the prosecution, enabling the presumption under s 50(1) of the MACC Act to apply. Further, it is also understood that HCJ1 had analysed the evidence proffered in the case of prosecution and arrived at the conclusion that:

(a) a prima facie case has been made out against the accused on the two amended charges under s 17(a) of the MACC Act;

(b) prosecution has offered credible evidence to prove each and every ingredient of the offence as required under the law;

(c) credibility of the prosecution witnesses (PWs) is intact, more so after maximum evaluation of their evidence;

(d) their credibility is also saved after cross-examination by the accused via his counsel;

(e) hence, the evidence proffered by the prosecution through the PWs are reliable;

(f) there has been maximum evaluation and careful analysis of the credibility and reliability of PWs and their evidence in its entirety, including evidence favoring the defence elicited during cross-examination of the PWs, thus disturbing the findings and conclusion arrived at by the SCJ;

(g) on that score too, the presumption of law pursuant to s 50(1) of the MACC Act applies;

(h) it is for the accused to state his defence, in order to displace the presumption applicable on a balance of probabilities. It is a higher burden placed on him as opposed to only raising a reasonable doubt on the case of prosecution made out against him and his guilt (see the oft-quoted decision by the Privy Council in *Public Prosecutor v Yuvaraj*

[1969] 2 MLJ 89 and the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169);

(i) thus, he has to prove on a balance of probabilities that he did not corruptly receive the gratification as an inducement to award the contract of works to the complainant SP3 as set out in the particulars of the offences for which he stands charged; and

(j) however, burden of proof on the prosecution remains unaltered. At the conclusion of trial, it must have proven its case beyond reasonable doubt (see: *Woolmington v DPP* [1935] AC 462).

[15] Following from the above, the SCJ, who had heard the case of prosecution had continued to hear the defence of the accused. During the case of defence, five (5) defence witnesses (DWs) testified. The accused had opted to testify from the witness box during his examination-in-chief, thus cross-examined by the deputy public prosecutor (DPP). Three of the DWs were from DBKL, who were in fact witnesses offered by the prosecution to the defence at the close of the case of prosecution.

DUTY OF THE SCJ

[16] Henceforward, duty of the SCJ is to lawfully comply with the decision made by HCJ1 and to continue with the case of the accused, as if she as a trial judge, had ordered for the accused to enter on his defence to the two amended charges under s 17(a) of the MACC Act. When doing so, the SCJ is duty bound to hear the evidence adduced by the accused and his witnesses in order to support his defence. In the present case, the accused had opted to testify as a witness, thus allowing himself to be cross-examined by the DPP appearing for the prosecution on the explanation and defence raised by the accused as well as that of the witnesses called by him to support his defence. Evidentially, it cannot be gainsaid that their evidence rendered during examination-in-chief, as well as cross-examination and re-examination have to be categorically considered by the SCJ. The SCJ does not have the option to pick and choose which of the evidence she wishes to consider.

[17] This is fortified by s 173(m)(i) of the CPC, where at the conclusion of the trial, the SCJ shall consider *all the evidence adduced before her* and shall decide whether the prosecution has proved its case beyond reasonable doubt. All the evidence does not only include evidence adduced during the case of defence but also that adduced at the stage of the case of prosecution, and for her to assess, evaluate and test it against the evidence tendered during the case of defence. That would be maximum evaluation of the evidence adduced in the trial in its entirety against the accused. As support, reference is made to the decision of the COA in the case of *Pendakwa Raya v Sanin bin Othman* [2010]

MLJU 1283 where it was decided that:

> When defence is directed to be called by an appeal court the trial judge must accept that a prima facie case has been proven. It is as if the defence was called by the learned judge himself (*Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129). Only after he has gauged the total evidence adduced, inclusive of all the evidence adduced at the prosecution's stage, and tested as against the defence evidence may the fate of the accused person be decided by the court. In short there will be a maximum evaluation of the whole evidence at the close of the defence.

DEFENCE OF ACCUSED

[18] Essentially, the accused had denied knowing the complainant SP3. He had denied that she ever met him, thus distancing himself afar from her. He had also testified that he does not know where he was on the two dates specified in the charge, *to wit* on 9June 2018, from 4 to 4.30pm and 17 January 2019 from 10pm to 12am. Flowing from that he had also claimed that a cartel had existed to remove him from DBKL, hence the baseless accusation against him. Pertaining transactions enveloped by the two charges against him, he had denied having received any bribe in relation to it. He had asserted that he did not have the power, authority and discretion to approve the impugned contract works and/or job assignments for SP3.

FINDINGS BY SCJ

[19] It was contended by the accused via his counsel that at the conclusion of trial, testimonies of DWs had remained unchallenged on the actus reus and mens rea elements constituting the offences alleged to have been committed by him. That includes matters pertaining work process at DBKL on the choice of contractors and issuance of job assignments to them; that it was strictly complied with and in accordance with the operating procedure of DBKL; thus, proving that he was not involved in the choice of DNSB, represented by SP3 to be assigned with the contract works cum job assignment.

[20] Truly believing the contention by accused, the SCJ at conclusion of the trial, decided that testimony of the accused person and his witnesses had remained unshaken by the prosecution, thus a reasonable doubt had been raised, not only on the act of giving the bribe, but also that the bribery did not take place. She then acquitted and discharged the accused from the amended charges for offences of corruption pursuant to s 173(m)(i) read with (iii) of the CPC. Her finding was however not in sync with the burden of proof placed on the accused who is supposed to have rebutted the presumption of law applied against him pursuant to s 50(1) of the MACC Act. It reads as follows:

> Jika dilihat kepada keterangan yang telah diberikan oleh saksi SD1 (Tertuduh), jelas bahawa keterangan beliau adalah konsisten dan menyokong versi pembelaan

semasa kes diperingkat Pendakwaan lagi. Tidak terdapat sebarang perbezaan mahupun percanggahan yang ketara versi pembelaan diperingkat Pendakwaan dan Pembelaan yang telah dikemukakan di Mahkamah.

FINDINGS BY THIS COURT

[21] It is apparent that the SCJ when adjudicating on the case of defence, had decided firmly that there has been no difference in the defence of the accused, both at the end of the case of prosecution and conclusion of his trial. This had occurred notwithstanding the decision by HCJ1 that there has been prima facie proof on the receipt of gratification by the accused, and it is for the accused to rebut it on a balance of probabilities. The pivotal issue which has to be addressed by the SCJ at conclusion of the trial, is if the accused had rebutted the presumption pursuant to s 50(1) of the MACC Act on a balance of probabilities or that the defence and explanation advanced by him and his witnesses were sufficiently probable to have displaced the said presumption.

[22] Alarming is the stark fact that albeit the defence raised was a bare denial and an afterthought, without any tangible or cogent proof in order to render his explanation probable on the facts and in the eyes of the law, the SCJ had found that the accused was successful in displacing the presumption of law under s 50(1) of the MACC Act. Indeed, it was not probable for the following telling reasons:

(a) he had failed to establish a nexus between him, the complainant SP3 and the alleged cartel, claimed by him to have existed at DBKL to remove him;

(b) the prosecution witnesses SP2 and SP3 are total strangers to the DBKL administration;

(c) the complainant SP3 only knew the accused person; and

(d) probability of the accused not knowing SP3 is also far-fetched, as SP3 had attended his son's wedding on his invitation. That piece of evidence remained uncontroverted until conclusion of the trial. It could be deduced that the accused would not have invited a stranger for his son's wedding, which is a family and social function. So, the complainant SP3 was invited because the accused knew her.

[23] Regardless of the above, the SCJ had decided that the accused had offered an honest explanation in his testimony to sustain his defence and explanation. She had again fallen into a grave error when she had found that there is no necessity for SP3 to bribe the accused, as the job assignment would reach her at an appropriate time once the award of contract for works is made. The same finding was made at the end of the case of prosecution before

A acquitting the accused, which was reversed by HCJ1 who had decided that the accused had received gratification of an amount of RM200,000 from SP3 corruptly as inducement for him to approve the contract works for SP3 on behalf of the entity DNSB. It has to be emphasised that the SCJ had not moved away from her earlier finding which was reversed. That amounts to
B non-compliance of the decision made by HCJ1, thus by doing so the SCJ had committed a serious error of law, simply because she ought to have proceeded with the case of the defence, as if she had ordered for the accused to defend himself to the amended charges under s 17(a) of the MACC Act.

C

[24] Obviously, she had also erred when she did not accord proper consideration to the unrefuted testimony of SP3 which was corroborated by SP2, that the cash gratification was in fact paid to the accused as inducement, so that SP3 was awarded the contract for works. Furthermore, she did not pay
D heed to the proven facts in issue in the case, which are:

(a) that an amount of RM200,000 was paid to the accused by SP3 and he had received it; and

(b) the payment was presumed to have been made corruptly by SP3 to the
E accused with the ulterior motive of obtaining the award for contract works.

[25] The above was borne out by the evidence proffered in the case of the prosecution, which was ruled by HCJ1 to be credible, reliable and in support
F of proof of a prima facie case against the accused. The same proof, warranted the accused to enter on his defence to the two amended principal charges preferred against him and to also rebut the presumption of law applicable against him.

G **[26]** Obviously, the oral evidence by SP2 and SP3 was uncontroverted by the accused, despite vehement cross-examination. Simultaneously, there is also no fresh evidence or evidence to the contrary adduced by the accused during the case of his defence to rebut the presumption of law applicable against him under s 50(1) of the MACC Act that the gratification was paid to him corruptly
H as an inducement so that the contract of works is awarded to SP3 who was representing DNSB at the material time.

[27] Another error of law committed by the SCJ is that she did not consider the testimony of the accused and his witnesses elicited by the prosecution as a
I result of cross-examination. On that issue, it would be purposeful to emphasize on the principles pertaining examination of witnesses in court during a trial. The witnesses play a pivotal role to unveil the narrative and truth in the case. Pursuant to s 137 and 138 of the Evidence Act 1950 (EA/Act 56), witnesses who take oath to testify are subjected to examination-in-chief,

cross-examination and re-examination. Cross-examination is an avenue available to the adverse party, the prosecution in the present case:

(a) to weaken and destroy the case of the defence;

(b) it is employed as the much-preferred tool to discover the truth from the witness; and

(c) to weaken the evidentiary value of his evidence.

In fact, s 146(a) of the EA provides that when a witness is cross-examined, he may be asked questions *inter alia* which tend to test his accuracy, veracity or credibility. The evidence elicited during cross-examination serves to be the most effectual way to test the veracity of witnesses as the trial judge is in a better position to observe their demeanor and take note of their credibility. In the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101 Abdoolcader FCJ (as he then was) had decided that the fruits of cross-examination can never be a matter for speculation. Therefore, answers elicited by the cross-examiner could throw a different light on the case, and it is salutary for the SCJ in the present case to have considered the answers elicited from the accused and his witnesses during cross-examination and then evaluate them appropriately. More so in the present case, to deduce and decide if the evidence elicited had indeed raised a reasonable doubt on the case of the prosecution and guilt of the accused and specifically in the present case if the accused in his defence has been successful to rebut the presumption of law under s 50(1) of the MACC Act 1950 applicable against him on a balance of probabilities. On that score, it is emphatically incorrect for the SCJ to have ignored the evidence of the DWs obtained as a result of cross-examination. By ignoring it and to deduce and decide based on the evidence adduced during examination-in-chief by those witnesses, only goes to show that the SCJ had only considered the case against the accused, tending to an acquittal, which was her decision ultimately.

[28] The version of the accused that SP3 had conjured up a story to implicate him, as there was a cartel to remove him from DBKL is an afterthought to suit his defence which was to distance himself as far as he could from the charges levelled against him for the following reasons:

(a) the complainant SP3 had no working relationship with the accused or with DBKL in general;

(b) she is merely an independent contractor, out there to procure the contract for works to her pecuniary benefit;

(c) the contract for works specified in the charge was under the aegis of the accused person, for his ultimate approval;

(d) there is no iota of evidence produced to show that SP3 knew any other officials of DBKL in order to conjure up a story to implicate the accused

and set him up against the law. If there is such fresh evidence, that would tantamount to be evidence to the contrary to the case of prosecution, on a balance of probabilities, but there is none; and

(e) the afterthought explanation and defence of the accused is misplaced as he has on one hand claimed he does not know SP3 and SP2 but on the other hand affirmed to state that SP3 had set him up against the law. It only shows inconsistency in his defence, which by its very nature does not dislodge the case of the prosecution.

[29] The testimony of SP2 and SP3 on the following matters renders the case of the prosecution proven beyond reasonable doubt:

(a) meeting with the accused person;

(b) the accused was readily waiting at his residence with his house gate opened for SP3 to arrive;

(c) the security guard at the guard house had instantly allowed SP3 who was driven by SP2 to enter the housing area where accused resides with no questions asked, hence no evidence of restraint by them;

(d) this coincides with the evidence of SD4 who had confirmed that he was unaware if any Chinese individuals were coming to meet the accused. Obviously, he would not know as he was not alerted of such an entry into the residential area;

(e) gratification of an amount of RM200,000 in cash was paid to the accused person;

(f) the work permit P2 tendered by the prosecution as proof of its case was dated 27 August 2018 which was materially after the meeting of SP3 with the accused person;

(g) it is a fact that works was assigned to SP3 and company DNSB only after the said payments were made. In turn, SP3 had allowed SP2 to carry out the said contract works as a sub-contractor, which was by virtue of a private arrangement between them; and

(h) the accused was in a favorable position at DBKL to award and assign the contract for works to contractors of his choice, including SP3, as he is entrusted with full authority to do so.

[30] The above matters too, negates the findings of fact by the SCJ who had decided to acquit the accused person at the end of his trial. The said conclusion was arrived at without proper consideration and evaluation of the case of defence, especially so the answers elicited by the prosecution during cross-examination of the accused person and his witnesses, and juxtapose it with the case of the prosecution. Her sum up of the case that the narrative of the

prosecution is false; testimony of SP2 was doubtful; thus there is no supporting proof by the prosecution that the accused had received gratification from SP3; there has been no delay in the award of the contract as the work permit for work to be done was not latched on to the award of the contract; that the impugned criminal conduct was impossible to have taken place as the prosecution chose not to tender sufficient proof of the CCTV recording, visitor's log book to the accused's residence; phone call details between SP3 and the accused person and that evidence by the accused was unchallenged, was against the weight of evidence.

[31] The law is set to show that a mere denial or an afterthought by the accused person does not render proof vide balance of probabilities. Thus, his denial and afterthought does not dislodge the case of the prosecution which has demonstrated proof beyond reasonable doubt that the gratification for a cash sum of RM200,000 was in fact paid corruptly to the accused (see the case of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324).

THE SECOND APPEAL

[32] Against the acquittal and discharge of the accused at the conclusion of trial, the prosecution has appealed to this court. Thus, case of the of accused has arisen twice on appeal to this court. First, when the accused was acquitted and discharged by the SCJ at the end of the case of prosecution and now upon conclusion of his trial.

[33] On that issue, in the course of hearing of this appeal, parties had raised the issue on the extent and/or limit of this court's appellate jurisdiction. Pivotal question raised is if the entire case of the accused was before this court for hearing pursuant to s 26 of the CJA. When I say entire case, it means the case against the accused from commencement of the case of prosecution until its end which had been dealt with by my predecessor HCJ1, and now upon conclusion of the trial, where the accused was acquitted and discharged of the charges preferred against him.

[34] Resolution of this jurisdictional issue is also set and certain in view of decided case authorities by the COA. Since the first appeal involving the decision of the SCJ to acquit and discharge the accused at the end of the case of prosecution had been determined by HCJ1, it stays. Thus, his decision for the accused to enter on his defence, remains unaltered, which could only be revisited by the COA when the entire case of the accused including this appeal reaches there for a final determination.

[35] The present appeal is only on the decision by SCJ who had acquitted and discharged the accused at the end of his trial after having heard and

considered his defence, pursuant to the order by HCJ1. That would be regardless of this criminal appeal being a rehearing pursuant to s 26 of the CJA, as decided in the case of *Public Prosecutor v Ma'Arif* [1969] 2 MLJ 65, where the entire case of the accused is subject to curial scrutiny and reassessment. But, as alluded to above, this court in its exercise of appellate jurisdiction shall only re-examine and reassess the findings made by the SCJ, at the end of the trial of the accused, when she acquitted and discharged him. To reiterate, hearing of this appeal is only limited to that decision of the SCJ.

[36] Further, since both HCJ1 and myself are of coordinate jurisdiction, it would be jurisdictionally incorrect for me to revisit, reassess and re-evaluate his decision. That, shall be the domain and jurisdiction of the COA, which may extend to issues pertaining propriety of the charges preferred against the accused; if defence ought to have been ordered for the accused to enter; applicability of the presumption of law under s 50(1) of the MACC Act and other issues connected therewith, and the present decision of this court.

SUBMISSION BY DEFENCE TO COUNTER THE APPEAL BY PROSECUTION

[37] With regard to the first charge, amendment was made to it by the prosecution for removal of the *actus reus* of the offence from 'memberikan kerja dengan mengeluarkan 3 permit kerja yang berjumlah keseluruhan RM619,053.34' to 'mengeluarkan permit kerja kepada Dusari Niaga'. This is contended by the accused to be a material alteration and payment of RM100,000 was to secure the three specific work permits, easily identifiable in view of tis defined amounts and the complainant, SP3 to the case would have directed her complaint specifically on the purpose for which she had bribed the accused, if she did so. Now that the alteration is reflected to be only for a work permit, the narrative of the prosecution had changed. In essence, contention by the accused is that the basis for the complaint made on the bribery cannot be altered. The case of the prosecution which is supported by the work permit P2, is thus labelled as dubious.

[38] As for the second charge, it is contended by the accused to have a taint of *mala fide* or bad faith by the prosecution when the charge was preferred against him. It is so, because the charge in its original content prior to amendment, indicates that a further sum of RM100,000 paid to the accused was for a different project and contract for works than that referred to in the first charge, which is 'memberikan kerja-kerja pembaikian dan menaiktaraf bebendul dan siarkaki di Lorong Ceylon (belakang Bangunan Boustead) Kuala Lumpur & sekitarnya'. Now, the prosecution narrative is altered to specify that the second cash payment of RM100,000 was made to the accused on 17 January 2019 pertaining the same contract for works and project as

particularised in the first amended charge.

[39] The prosecution to prove its case had narrated through its witnesses SP3 that the first cash payment of RM100,000 was made on 9 June 2018, after which a work permit P2 was issued on 27 August 2018 to DNSB. Hence, work was purportedly done after issuance of the said work permit. Contention by the accused is that since P2 showed that work was allowed to be done between the dates 27 August 2018 and 26 September 2018, there has been no documentary proof to show exactly when the work was carried out. Thus, one has to speculate as to when the work was assigned and later carried out. There has been no issue raised by the prosecution on the works undertaken by DNSB, as it was carried out and completed within the time frame specified. As such, question was raised, since work was completed in the month of September 2018, what then is the necessity for SP3 to make another cash payment of RM100,000. Therefore, it is summed up by the accused that the allegation against him was false and the payment in fact pertains a different project on later date but the gratification paid on the date specified in the charge is maintained.

[40] The other complaints raised are that:

(a) the allegations of bribery against the accused were only vide oral evidence, unsupported by documentary proof;

(b) the complainant SP3, had misrepresented to DBKL that she was in fact from DSNB, thus having a private arrangement with the real owner and paying the owner 5% of the contract amount in return;

(c) SP3 claimed to have borrowed money from SP2 in order to pay the accused, as she was financially desperate and jobs were delayed from being given to DSNB;

(d) the SCJ was correct in concluding that the presumption under s 50(1) of the MACC Act did not apply as giving of the gratification was not proved;

(e) SP3 is not a credible witness as she is an accomplice pursuant to s 52 of the MACC Act. Therefore, she has the tendency to save her own skin thus implicating the accused. Further, her involvement in the act of bribery should also disqualify her from testifying against the accused. Her testimony has to be weighed and judged in the same manner like any other prosecution witness;

(f) after having weighed the testimony of SP3, the SCJ was correct in concluding that SP3 was unworthy of credit;

(g) according to the written submission by DC for the accused at para 44 at p 23 it was contended that after the matter was remitted back to the

sessions court for the SCJ to hear the defence of the accused, *the SCJ had to consider whether the accused had raised one or more reasonable doubts on a balance of probabilities to the entire prosecution's case.* (Emphasis added.)

(h) the SCJ did not revisit the decision made by HCJ1, but on the contrary she had considered new evidence that raises a reasonable doubt on the case of prosecution in its entirety.

(i) the gist to the prosecution's narrative is that SP3 need to bribe the accused, as delay had occurred for DNSB to be awarded the contract for works by DBKL. To illustrate the delay, three documents were tendered by the prosecution, *to wit,* P1 — the offer letter dated 21 February 2018; P3 — *Surat Arahan Mula Kerja* dated 27 March 2018 for the specific project stated in P1 as well as the particulars in the amended charges; P2 — work permit dated 27 August 2018 which is for a different project pertaining *kerja-kerja penggantian penutup longkang yang hilang dan rosak di Parlimen Lembah Pantai, Kuala Lumpur dan sekitarnya*;

(j) all along the narrative was that the project was awarded to DNSB earlier in the month of February or March 2018 which was proven to be untrue by the witnesses from DBKL. Work was given via work permit P2 dated 27 August 2018, causing the prosecution to state that the job assignment was delayed, which is both false and misleading;

(k) that cannot be true as P1 and P3 refer to repair of roads damaged by utility companies which is undisputed. SD2 had confirmed that the utility companies were the leading cause of road damage, for which a special unit permit is required to deal with the replacement and resurfacing of the damaged roads by the utility companies;

(l) P2 was issued for a different project, which was for replacing lost or damaged manhole covers, hence the case of prosecution was misleading;

(m) the SCJ had found that according to SD3, the contract referred to in both the amended charges falls squarely within the purview of the unit permit;

(n) SD5 as the lead engineer heading the Unit Permit which handles all resurfacing work for damage done by utility companies, had testified that all work permits in his division has to be verified by him. He had identified that the offer letter P1 and testified that it was the only contract his unit permit had managed throughout the year 2018 and 2019. As for P2, he had stated that the said document and contract was not under Unit Permit;

(o) thus, there is a gap in the case of prosecution as it is premised on a work permit for a specific contract which was not shown to the court. The work permit P2 has no nexus with P1 and P3 nor with the contract for *pengisaran dan penurapan semula* as it is a manhole replacing contract,

which cannot be used to substantiate any delay pertaining the contract for *pengisaran dan penurapan semula*;

(p) no work permit was produced by the prosecution to support the first and second charge. The work permit for resurfacing did not exist;

(q) however, it is noteworthy that once a contractor is awarded the *ad hoc* contract of works, as stated in both the charges, it would receive jobs to do as testified by SD2 and SP4;

(r) the contract referred to in both the charges is *ad hoc* contract to repair damage to roads caused only by utility companies. This is so stated by SD2. He had made it clear that there are no timelines or assurances given by DBKL on the *ad hoc* project as it depends on when the damage occurs;

(s) thus, the finding by the SCJ is correct when she said at paras 99 and 100 of her judgment as follows:

> 99. Kerja-kerja ini hanya boleh diberikan secara ad hoc, dan DBKL tidak menjanjikan bilakah akan diberikan kerja-kerja kepada kontraktor. Ianya bergantung kepada kerosakan spesifik pada jalanraya yang diakibatkan oleh syarikat utility. Justeru itu, setelah Mahkamah ini meneliti secara keseluruhan keterangan saksi-saksi pembelaan dan pendakwaan, versi keterangan SP3 bahawa terdapatnya kegusaran dari pihaknya kerana berlakunya kelewatan mendapat jobs adalah didapati tidak berasas (*unsustainable*).
>
> 100. Secara kontraknya, tiada obligasi pada pihak DBKL untuk memberikan kerja kerja sehingga sebarang kerosakan jalanraya itu wujud. Kesemua ini merujuk kepada terma-terma kontrak yang mengikat kesemua kontraktor termasuk Dusari Niaga.

(t) at para 128 of her judgment after having referred to the testimony of the witnesses from DBKL, it was confirmed that there was no any form of wrongdoing or delay on the facts of the case;

(u) the prosecution had not produced as evidence, the Control Book and *Fail Kerja,* thus adverse inference ought to be drawn against them. The control book is relevant as it is reference by all engineers and assistant engineers when considering which contractor to be engaged for a given job. If there was any wrongdoing or deliberate omission of the choice of contractors, this book would be the primary evidence fulfilling the best evidence rule as it would unearth any omissions in job allocation;

(v) the *fail kerja* on the other hand was also kept away during the trial. That file would contain all documents of a given job. It includes minutes of instructions, including who chose which contractor for each job. Its non-production too offends the best evidence rule;

(w) the SCJ had also made adverse comments on the prosecution over non-production of those documents. According to the SCJ, the *fail kerja*

ought to be produced to show when time starts to run and that the computation of delay would not commence from the issuance of P1 or P3 as at that time it was only determined that DNSB was the contractor who has to fulfill the needs of preparing the bond and insurance. She had found:

> Persoalan berkaitan dengan kelewatan yang digusari oleh SP3 yang menyebabkan beliau dikatakan terdesak memberi wang rasuah hanya boleh disimpulkan kesahihannya dengan mengetahui bila sebenarnya jobs diberikan.

(x) it was SD5 who had chosen DNSB and not the accused;

(y) on SP3's visit to the accused person's house, she would not have been able to come in without signing in. There is also no CCTV recording produced nor the visitor log book. Likewise, SP3's presence at the Treats shop at the petrol station could have been recorded by the CCTV at that place, which was not produced. SP3 is said to have concocted a dishonest story to implicate the accused person;

(z) in a nutshell, it is contended that the very act and purpose of bribery could not have taken place. Not a single witness from DBKL had said that there was actual delay or complaint of delay or DNSB was chose unfairly. The accused is unsure as to which job assignment the prosecution is referring to; and

(aa) further, specific verification about the three criteria undertaken by the department, JKAPB at DBKL and the chain of work as well as acknowledgement by SD3 that it was him and SD5 who made the recommendation and not the accused raises concerns if SP3 is a credible witness.

REPLY BY PROSECUTION

Ingredients of the offences proven

[41] It has been proven by the prosecution that the accused had corruptly received gratification a cash sum of RM200,000 from the complainant, SP3. By virtue of that, the SCJ was directed by HCJ1 to hear the case of the defence and she is not at all in a position to revisit that finding by HCJ1. Albeit doing so, the SCJ had paid lip service to the testimony of SP2, who had testified that he had loaned the amount of RM200,000 to SP3 in order for her to pay the accused, which stood uncontroverted until the end of trial. As she did at the end of the case of prosecution, she had also questioned the need for the accused to be bribed by SP3, as according to her finding, the need does not arise in view of the work process involved at DBKL on the award of contract for works. To iterate, her finding flew across the cogent evidence tendered by prosecution in

the form of P2, the work permit, wherein it was only issued to SP3 for and on behalf of DNSB upon payment of the gratification to the accused.

[42] Thus, surveying the case of defence, the accused was unable to rebut the proof by the prosecution that he had indeed received the said gratification of RM200,000 in cash from SP3 corruptly as inducement for the issuance of the contract for works to DNSB. In the absence of any fresh evidence or evidence to the contrary from by the accused person, the presumption under s 50(1) of the MACC Act applicable against him stood unrebutted.

Testimony of defence witnesses (DWs)

[43] Three DWs had testified for and on behalf of the accused. They are SD2, SD3 and SD4. Their testimonies do not support the defence of the accused for the following reasons:

(a) the testimony by the prosecution witnesses SP2 and SP3 that they had been to the accused's residence on the night of 17 January 2019 stood unrefuted. Although SD4 was called by the accused to contradict that testimony, but he was unable to do so as when he was cross-examined by the prosecution, he had stated that he was he was unsure if the meeting did take place. With that the evidence offered by SP3 and SP2 stands up against the accused person;

(b) SD4 had also confirmed that he could not remember where he was on the night of 17 January 2019 and that he was unaware of the presence of two chinese individuals at the respondent's residence on the night of 17 January 2019;

(c) there is also no iota of evidence from SD4 that he was present at the respondent's house on the date when SP2 and SP3 had delivered RM100,000 to the accused; and

(d) this piece of testimony by SD4 has to be juxtaposed with the evidence by the accused that he was also unsure where he was on the night of 17 January 2019. Seemingly they had rhymed the same tune, on the face of the uncontroverted testimonies by both SP3 and SP2, who were allowed entry by the guards at the guard post to enter the residential area of the accused without any questions asked nor restraint and on reaching the house the gate to the accused's house was wide open, implying that the accused was readily waiting for their arrival. On that score, the harp and repetition by the accused, that no CCTV recording or guest log book was produced by the prosecution remain preposterous.

Issue of corroboration

[44] Premised on the record of evidence available, the testimony of SP2 was

not alone but independently corroborated by the testimony of SP3. In fact, without corroboration, SP3 had proved herself to be a credible witness offering credible evidence to support the case of prosecution. As such, the law does not demand corroboration as a rule. However so, additionally her testimony in court was corroborated by the testimony of SP2 on the material particulars. There is no reason to disbelieve SP2 who had only ferried SP3 to the places where the act of bribery had taken place. Moreover, he was also the recipient and beneficiary of the job assignment as a subcontractor via SP3. It was also on that basis, HCJ1 had ordered for the accused to enter on his defence to the charges preferred against him.

Attempt by defence counsel to revisit case of the prosecution

[45] Counsel for the accused during hearing of this appeal had harped and repeated on the work process at DBKL with regard to the award of contract for works which was already ventilated and determined by HCJ1 when he decided to order the accused to enter on his defence. That decision by HCJ1 was not made capriciously but after having considered the testimony of the prosecution witnesses and the supporting documentary proof produced.

Red herring

[46] Only during hearing of this appeal before me, the defence counsel had submitted that during the case of the prosecution, the prosecution had produced as exhibit an incorrect permit to carry out contract works in relation to the subject matter of the charges against the accused person. It was a red herring thrown in to thwart the case in favor of the accused person.

Biased approach by the trial judge

[47] The SCJ after having heard the defence of the accused had once again acquitted and discharged him from the charges but when doing so had committed the following findings which are *plainly wrong* in law:

(a) she had erred when she did not consider the testimony of the accused and his witnesses elicited from them when they were cross-examined by the DPP;

(b) by doing so, she had again erred when she had again pointedly made a finding of fact that it was totally unnecessary for SP3 to bribe the accused by paying him gratification the cash amount of RM200,000;

(c) this *per se* is a step taken by the SCJ unjustifiably, because as a trial judge she cannot pick and choose evidences to suit her ultimate decision to acquit and discharge the accused from the charges, but only to arrive at an appropriate finding after having considered and evaluated the

evidence available in the case in its entirety; and

(d) the SCJ has capriciously side stepped the trite principle of law that cross-examination is an acid test to determine the credibility of a witness, including the accused who had opted to adduce evidence from the witness box. What could be the use of that evidence in a witness box, when the trial judge did not at all consider his evidence and his witnesses during cross-examination.

FINDINGS BY THIS COURT

[48] On the submission advanced by the accused via his counsel, the following are findings of this court pursuant to the record of evidence available:

(a) the amendment to the charges does not materially alter the narrative of the prosecution, which is that the bribe paid by SP3 was in fact for the purpose of securing the contract for works for DNSB which is supported by the work permit issued as in P2. The materiality of the allegation against the accused which forms the foundation of the charge, remains intact, which is that the accused had received the gratification from SP3 in order for DNSB to be awarded the contract for works, as it was ultimately awarded, resulting from her act of bribing the accused. With the production of P2, there is no necessity for the prosecution to produce as evidence any other work permits, unrelated to the amended principal charges;

(b) likewise, the alterations made do not prejudice the accused, as it was supported by evidence from the complainant SP3, her story corroborated in material particulars by SP2, whose testimony is material as he undertook the contract for works;

(c) on the question raised, since work was completed in the month of September 2018, what then is the necessity for SP3 to make another cash payment of RM100,000 to the accused. Thus, the allegation against him was false and the payment in fact pertains a different project on later date but the gratification paid on the date specified in the charge is maintained. This argument by the accused is preposterous or in other words, *shooting himself in his foot,* as the payments made by SP3 was pursuant to the demand made by the accused person, on the pretext of a 'sponsorship' suggested by him, and it was paid in two tranches for the contract for works to be awarded to DNSB;

(d) record of evidence also shows, it was a direct deal between SP3 and the accused person. Bereft of any document inking the deal, the prosecution could only proffer oral testimony by the complainant who had paid gratification corruptly to the accused. As such, the case of the prosecution stands on the oral testimony of both SP3 and SP2.

Moreover, in terms of the law, there is no rule of evidence that the oral evidence should in every case be disregarded or rejected in the absence of documentary evidence or that documentary evidence should in all cases be preferred over to the oral evidence. The oral evidence in order to be found acceptable and trustworthy both alone or with documentary evidence or even in the teeth of the documentary evidence *should be tested both intrinsically and extrinsically by cross-examination*. Nothing can be more dangerous than to act upon such testimony without testing its credibility both intrinsically and extrinsically (see: *Commentary on Law on Oral and Documentary Evidence* (4th Ed by CD Field, Delhi Law House)). Exactly on point the SCJ had erred when she did not consider the credibility of SP3 and SP2 both intrinsically and extrinsically after due consideration to the evidence adduced by the prosecution as well as the defence in its entirety. The SCJ took an easy way out by rejecting their evidence, without any basis but merely to say they were not credible witnesses when their evidence taken *in toto*, including the fact that they stood stoic and endured the vehement cross-examination by the defence counsel, which only points to the criminality and guilt of the accused;

(e) the crux of the case of the prosecution against the accused is the corrupt act by the accused in relation to the affairs of his principal, DBKL and it is also a fact from the record of evidence that the contract for works was in fact successfully procured by SP3 which was supported by the testimony of SP2. Thus, as to the mode and manner of the contractual arrangement of SP3 with DNSB is not at all material to the case against the accused. Moreover, it was also not an issue raised by the accused when he demanded for a 'sponsorship' from SP3, whom he knows hailed from DNSB;

(f) the loan by SP2 to SP3 was proven as a fact by SP2, who had also ferried SP3 to both the Treats shop and residence of the accused to hand over the monies;

(g) for the SCJ to conclude that the presumption under s 50(1) of the MACC Act did not apply as giving of the gratification was not proved, is inexplicable in view of the fact that HCJ1 had decided to order the accused to defend himself to the charges preferred against him on the basis the gratification was paid to the accused and it was received by him corruptly. Thus, it is for him to rebut the said presumption on a balance of probabilities.

(h) contention by the DC for the accused in his written submission that when the case was remitted back to the sessions court for the SCJ to hear the defence of the accused, she had to consider whether the accused *had raised one or more reasonable doubts on a balance of probabilities to the entire prosecution's case* (Emphasis added.) is a submission repugnant to the law of evidence, as there cannot be a hotchpotch on the burden of

proof. To raise a reasonable doubt is of a lower burden on the accused as opposed to rebutting the presumption of law under s 50(1) of the MACC Act, which is on a balance of probabilities, a higher burden placed on the accused;

(i) moreover, there has been no fresh evidence or evidence to the contrary rebutting the presumption of law applied against the accused person. To the contrary, case of the prosecution was intact against him and proved beyond reasonable doubt;

(j) the finding by the SCJ that according to SD3, the contract referred to in both the amended charges falls squarely within the purview of the unit permit flies across the weight of evidence *to wit* his testimony upon cross-examination by the prosecution, which was not considered by the SCJ;

(k) the testimony by SD5 as the lead engineer heading the Unit Permit handling all resurfacing work for damage done by utility companies, and that all work permits in his division has to be verified by him, has to be viewed together with his evidence of positive identification of P2, and his testimony that the said document and contract was not under Unit Permit. Therefore, the position remains neutral and it does not in any manner contradict the case of the prosecution, as submitted. Progressively, SP3 was in fact waiting eagerly for the award of contract for works from DBKL, thus she had to bribe the accused person to procure the said works with immediate effect pursuant to his sheepish request for a 'sponsorship';

(l) however, as testified by SD2 and SP4, that once a contractor is awarded the contract for works, as stated in both the charges, it would receive jobs to do, which *per se* supports the case of prosecution; and

(m) on the contention that the very act and purpose of bribery could not have taken place as not a single witness from DBKL had said that there was actual delay or complaint of delay or DNSB was chosen unfairly and that the accused too was unsure as to which job assignment the prosecution is referring to, is without any basis. The accused was fully aware and appraised of the amended charges levelled against him, as his counsel had harped and repeated throughout the case of prosecution as well as defence, that delay in the award of contract for works was not attributable to DBKL, and that it would be awarded on a timely basis when the job necessity arises, implying that it is unnecessary for SP3 to bribe the accused, as eventually, the contract for works would be awarded to DNSB. Thus, his contention that he was misled by the amendment of charges, thus prejudiced is displaced by his own narrative throughout his trial. Furthermore, his request for a 'sponsorship' from SP3 as well as the

issuance of P2 after payment of gratification serves as an *albatross* against him.

[49] As alluded to earlier in this judgment, it is not the duty of this court hearing this appeal by the prosecution on the order of acquittal and discharge made by the SCJ after having heard the case of defence, upon conclusion of trial, to revisit and re-evaluate the decision by HCJ1 that a prima facie case has been established against the accused, which stands to reason, as premised on the record of evidence available, there has been sufficient credible evidence forming the case of prosecution as proof of the ingredients of the offences committed by the accused, sufficient enough for the presumption of law under s 50(1) of the MACC Act to apply against the accused person. To iterate, only the COA could revisit the case of the accused person in its entirety when this appeal by the accused reaches there (see: the case decided by the COA in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845).

[50] Surveying the evidence of the prosecution, exh P2 was tendered in court as proof of the work permit issued by DBKL to carry out contract works. Production of P2 was supported by the untainted oral testimony of SP4 who had certainly confirmed that was the work permit issued by the accused to carry out the contract of works awarded to DNSB via SP3. She had pursued to explain to the court that there is in fact a difference between work permit to carry out contract works and letter of instruction to commence contract works. She had testified:

> Surat Arahan Mula Kerja adalah satu dokumen arahan bagi menjalankan kerja yang diberikan kepada pihak syarikat yang telah menandatangani Surat Setuju Terima yang mengandungi tajuk kerja utama dan tarikh milik tapak. *Manakala Permit Kerja adalah satu dokumen kebenaran menjalankan kerja kepada pihak syarikat bagi menjalankan kerja di dalam rezab jalan awam yang mengandungi tajuk kerja khusus dan tempoh kerja.* (Emphasis added.)

[51] Hence, with the production of P2 as proof of the work permit to carry out contract works and the crystal-clear explanation by SP4 on the difference between a letter of instruction to commence contract works and permit to carry out contract works, it is beyond doubt that P2 was issued to DNSB via SP3 as permission for it to carry out the contract works. Additionally, that piece of material evidence by the stands out like a sore thumb against the accused person which is uncontroverted and cannot be missed by the SCJ.

[52] Perusing the record of evidence, the issue on the issuance of the work permit to carry out contract works is maiden and raised only during hearing of this appeal and not any time earlier at the trial court or even before my predecessor HCJ1 when he heard and determined the first appeal. Thus, the

dubiousness of P2, as contended by the accused via his counsel, is only a *red herring* thrown in to off balance the case of the prosecution, and also to thwart this appeal by the prosecution on the ultimate acquittal and discharge of the accused at the end of his trial.

[53] The SCJ had also made erroneous findings of fact on the testimony of SD4. Without testing his evidence against the testimony of SP2 and SP3 on the presence of accused at his residence on the night of 17 January 2019 and juxtaposing it with the obvious testimony of the accused himself that he could not remember where he was on the said date, the SCJ chose to believe SD4 but had ignored the testimony of SP3 supported in its material particulars by SP2. By doing so, the SCJ did not consider the stark fact that SP2 and SP3 were present at the accused's house on the said date and albeit cross-examination, they remained steadfast and consistent, thus their evidence was uncontroverted.

[54] Her ultimate decision to acquit and discharge the accused person is skewed and tends to only an acquittal. In that respect, the complaint made by prosecution as the appellant to this appeal in its petition of appeal as well as submission advanced is with basis after having considered the facts, circumstances and evidence adduced in the case, as borne out by the record of evidence. In that regard, the following are apparent:

(a) conduct of the trial judge by only adopting the answers given by the accused during examination-in-chief does not arise out of thin air, but fortified in her judgment, as pointed out by the learned DPP Wan Shaharuddin Wan Ladin, who had arduously combed through the entire record of proceeding and candidly submitted that pp 86–143 of the judgment by the SCJ is identical to the submission by the defence counsel (DC) advanced to the sessions court after conclusion of trial, in terms of font size, topic adopted, sentence structure and language used. For the record see pp 86–143 of the judgment by the SCJ at *Jld* 1 of the record of proceeding and submission by the DC at pp 249–313 at *Jld* 4B of the record of proceeding. There is no necessity for the SCJ to do so, as she is bound by law to embark on a maximum evaluation of the defence put forward by the accused with his own testimony and his witnesses. To put it categorically, at the conclusion of trial, the SCJ is supposed to have:

    (i) combed through the evidence in the case of the prosecution;

    (ii) combed through the evidence in the case of the defence;

    (iii) without any choice of picking and choosing which aspect or part of it she wishes to consider;

    (iv) juxtapose it to consider if the case of the defence has the effect of raising a reasonable doubt and in the present case, if it had

A rebutted the presumption of law applicable on a balance of probabilities;

(v) in doing so, she has to embark on a maximum evaluation and not to be myopic by only considering one aspect of the case. It has to be ALL;

B

(vi) saliently, she has to adhere to the evidence proffered in the case. The submission advanced by parties is only a guide to assist her in order to make a finding and ultimately decide on the fate of the accused. In that regard, it would be highly improper for her to follow and adopt the submission of one party and when doing so, ignored the submission advanced by the prosecution; and

C

(vii) as that has taken place, the SCJ is deemed to have not applied her judicial mind when deciding on the case of the accused consistent with the principle of justice, *justice must not only be done but also seen to be done.*

D

[55] In the present case, if the SCJ would have embarked on the above, she would have arrived at an appropriate finding of fact that the accused was unable to rebut the presumption of law under s 50(1) of the MACC Act on a balance of probabilities. Premised on the record of evidence, prevailing is probability of the case of the prosecution being true against the inconsistencies, contradictions and falsehood by the accused in order to distance himself afar from the offences of corruption he has committed.

E

F

APPEALABLE ERROR

[56] Flowing from the above, it is clear as crystal that the SCJ did not heed to the finding by HCJ1 that there was payment of gratification made corruptly to the accused by SP3, as such the presumption of law is applicable. The SCJ had merely copied the submission of the DC for the accused on the following material issues:

G

(a) *burden of proof at the end of the case of defence* — in her grounds of judgment (GOJ) at pp 90–94 of the appeal record (AR) Volume 1 and submission at pp 253–255 of the AR Vol 4B;

H

(b) *on the application of the presumption of law under s 50(1) of the MACC Act* — in her GOJ at pp 94–99 of AR, Vol 1 and submission at pp 255 to 259 of AR Volume 4B;

I

(c) *that the presumption has been rebutted by the accused* — in her GOJ at para 18(i)–(xiii) at pp 99–100 of AR, Vol 1 and submission at para 16(i)–(xvii) at pp 260 to 261 of AR, Vol 4B;

(d) *that the testimony or evidence offered by the accused is consistent and*

remained unshaken — in her GOJ at paras 19–34 at pp 100–105 of AR, Volume 1 and submission at paras 17–33 of AR, Vol 4B;

(e) *that the defence of the accused is not an afterthought, conjured up and a bare denial* — in her GOJ at paragraphs 35–41 at pp 105–106 of AR, Vol 1 and submission at pp 265–268 of AR, Volume 1;

(f) *that the accused had denied asking for and/or receiving gratification from SP3* — in her GOJ at paras 41–45 at pp 107–108 of AR, Vol 1 and submission at pp 268–269 of AR, Vol 4B.

(i) at the Treats shop at the Petron petrol station at MRR2 Bukit Antarabangsa — in her GOJ at paras 46–53 at pp 108–110 of AR, Volume 1 and submission at paras 49–60 at pp 269–272 of AR, Volume 1; and

(ii) at residence of the accused – in her GOJ at paras 54–71 at pp 110 to 115 of AR, Volume 1 and submission at paras 61–82 at pp 272 to 275 of AR, Volume 4B.

(g) *that there is no necessity or opportunity for the accused to ask for gratification from SP3 in order to issue the work permit* — in her GOJ at paras 74–74, 77, 87–93, 94, 142–146 at pp 116, 119–122–124, 141–143 of AR, Vol 1 and submission at paras 87–88, 92, 102, 118– 127, 181–183 to 192 at pp 277–278, 280 to 283, 285–288, 309–310 and 310–313 of AR, Vol 4B; and

(h) *even the conclusion on the finding of fact by the SCJ is replicated* — in her GOJ at pp 147 to 152 of AR, Vol 1 and submission at paras 193–196 at pp 314–316 of AR, Vol 4B.

[57] The above only demonstrates there is no effort by the SCJ to have combed through and analysed the evidence proffered in the case in its entirety, both of the prosecution and defence, but had merely copied the submission by the DC on the salient ingredients to be proven by the prosecution, by adopting only the position taken by the accused via his DC, in the course of it had ignored the submission by prosecution. The copying that had taken place was extensive, which is an affront to the exercise of judicial discretion before arriving at an appropriate finding of fact in terms of the evidence and the law.

[58] The facts in issue in this case was not at all considered by the SCJ, *to wit,* in the main, whether a crime was committed and did the accused commit it. In fact, HCJ1 has made it easier for the SCJ, to adhere and rely on, that the accused had received the gratification corruptly in the form of cash the sum of RM200,000 from SP3 which is supported by the testimony of SP2 who had loaned the said amount to SP3, as she was financially strapped after which the contract for works was given her company DSNB, thus the presumption of law

pursuant to s 50(1) of the MACC Act, is made applicable.

IN A NUTSHELL

[59] In a nutshell, on the errors, flaws, misdirection and non-direction by the SCJ, the DPP had submitted that the SCJ had erred when she had found the following:

(a) testimony of SP2 was doubtful;

(b) there was no corroborative evidence on the receipt of corrupt money by the accused;

(c) she had erred when she did not consider the replies given by DWs when they were cross-examined by the DPP;

(d) she had made a bare assertion that SP2, SP3 were not telling the truth. The other evidence available was not considered;

(e) evidence of SP3 ought to be considered together with that of SP2 who had seen SP3 who entered with the bag containing money;

(f) the court could have viewed the other evidence available viz receipt of the money by the accused;

(g) the accused had the full power to choose the contractor;

(h) date of the work permit, 27 August 2018 (P2) was after the meeting with SP3; and

(i) the accused had failed to rebut the presumption under s 50(1) of the MACC Act.

[60] To the contrary, the DC had submitted the following:

(a) the prosecution's narrative is false;

(b) no delay in the award of the contract, work permit for the work to be done is not latched on to the award of contract;

(c) criminal conduct in question is impossible to have taken place as in the first place:

(i) prosecution did not tender sufficient proof of the CCTV recording;

(ii) visitor's log book as well as details on the phone call between SP3 and SD1; and

(iii) SD1's evidence remained unchallenged.

(d) events which is alleged to have taken place is impossible to have occurred;

(e) strong evidence from the defence to rebut the presumption of law under s 50(1) of the MACC Act on a balance of probabilities; and

(f) not a case for appellate intervention.

APPELLATE INTERVENTION

[61] Judicial appreciation and evaluation of evidence by the trial judge includes a careful analysis of the credibility and reliability of the witnesses in the case *in toto.* It is also her duty to consider the entire evidence presented in court, including the evidence which favors the defence (see: *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). On what constitutes judicial appreciation of evidence, it is apt to bear in mind the words of Gopal Sri Ram JCA (as he then was) in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, where it was decided:

(a) a judge who is required to adjudicate upon dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him;

(b) he must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria;

(c) thus, he must consider the presence or absence of any motive that a witness may have in giving his evidence;

(d) if there are contemporary documents, then he must test the oral evidence of a witness against these;

(e) he must also test the evidence of the particular witness against the probabilities of the case;

(f) a trier of fact who makes findings based purely upon a demeanor of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected upon appeal; and

(g) it does not matter whether the issue for decision is one that arises in civil or criminal case: the approach to judicial appreciation of evidence is the same.

[62] Another case of importance is *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257, a decision by Thomson CJ who had decided that *in the absence of any element of inherent probability the evidence of any witness, who gives evidence on affirmation, should normally be accepted*. In the case of *Noor Azman bin Abidin v Public Prosecutor* [2013] MLJU 703; [2014] 1 CLJ 58, on judgment writing, it was decided by the COA, that there has to be a just and fair assessment of the defence story so long as it is not inherently incredible

considering that it is for the prosecution to prove its case beyond reasonable doubt at the case of prosecution as well as the defence stage, notwithstanding the fact where the law may require the defence to rebut the charge on balance of probabilities. In the present case, the SCJ had erred by not doing so, when in her grounds of judgment, had only considered the evidence *tending to an acquittal* and not all the evidence available in the case in its entirety. That goes to demonstrate that the SCJ had justified the order of acquittal of the accused by choosing to harp and repeat on the shortcomings of the case of the prosecution, which if scrutinised, are not shortcomings at all, and in some of the instances, it is unnecessary for such evidence to be procured or adduced by the prosecution as it is not their duty to do so, and also that the facts and circumstances of the case do not warrant for the prosecution to do so. See list at p 108 onwards of the submission by DPP, comprising:

(a) there is no opportunity for the accused to demand gratification from any of the DBKL contractors as the process involved for choice of tender and award of contract was not in his hand;

(b) choice of a contractor would be suggested and supported by an Assistant Engineer, Engineer and Deputy Director based on the 'Control Book'. It is only after that the matter would be escalated to the accused for his approval, albeit the power to do so has been delegated to him according to the stipulated ISO. There has been no challenge on this by the prosecution;

(c) each of the DBKL contractors who is chosen and awarded the contract would receive a letter of instruction to commence works, as in P3;

(d) each contractor chosen would received the project of works from DBKL;

(e) there is no reason for SP3 to hold that the contract of works would not be awarded to her, for her to gratify the accused as eventually she would receive the award of works;

(f) there is no evidence tendered by the prosecution to show that the DBKL contractor was not awarded the contract of works within two years from the tender choice and not achieving their target; which is said to be the bane raised by SP3, causing her to gratify the accused in order to obtain the award of contract. The prosecution too, was unable to raise a challenge on this issue when cross-examining the accused;

(g) there is no evidence on the existence of the monies amounting to RM200,000 which is alleged to have been received by the accused;

(h) the receipt of the said monies was doubtful, as the MACC did not investigate on its money trail;

(i) there is also no evidence that the MACC had investigated the loan of RM200,000 by SP2 to SP3. Only available is their oral testimony;

(j) no receipt of withdrawal was tendered in court during the trial;

(k) SP3 did not testify on the purpose of the loan;

(l) there is also no evidence on the repayment of the said monies;

(m) no evidence was tendered to support the withdrawal of RM150,000 by SP2 from his CIMB account for the purpose fo lending it to SP3;

(n) there is also no evidence as to when SP3 met up with the MACC to lodge a report on the payment of gratification to the accused, showing that she is of a dubious character;

(o) after having analysed the testimony of the accused, and his witnesses SD2, SD3, SD4, SD5 and prosecution witness SP4, there is no reason for the accused to have demanded gratification from SP3;

(p) as the contract works are awarded equitably to all contractors, there is no necessity for SP3 to gratify the accused person;

(q) there is no cogent proof of the handing over of the gratification by SP3 to the accused at the treats shop at Petron;

(r) at the said shop there were many people around and a CCTV had existed, but the investigation officer of the case chose not to inform the court that there was no CCTV at the said shop in the year 2018;

(s) it does not stand to reason for the accused to have committed the offence at the said shop when he knew that there was a CCTV;

(t) there is no possibility for SP3 to hand over an amount of RM100,000 in an open area to the accused. Ordinarily, such an offence would not be committed in a conspicuous place in the vicinity of people;

(u) there has been no production of call logs or record of telephone conversation between SP3 and the accused;

(v) MACC too did not procure any call logs or telco statement to confirm the locality as to where the telephone had taken place between SP3 and the accused;

(w) if the receipt of the monies was in fact true at the said shop, then the call logs and telco statement would lend support as proof of the payment of gratification;

(x) the accused was not investigated on the occurrence at the Treats shop;

(y) the prosecution chose not to advance any questions to the accused on the telephone conversation between SP3 and the accused, during cross-examination;

(z) there has been no movement record and/or visitor's log book produced

by the prosecution to show that SP3 and SP2 had entered the residential area of the accused person;

(aa) upon analysis of the testimony by SD1, SD4 and document D23, it is clear that the testimony of SP2 and SP3 is doubtful;

(ab) the testimony of SD1, SD4 and document D23 were accepted by the prosecution without any challenge;

(ac) there has been no evidence forthcoming from the prosecution that the accused allowed entry of SP3 to his residential area and he assisted her in doing so;

(ad) as the accused had stated that his house is equipped with a CCTV, there has been no evidence by the prosecution that his house was not equipped with one in the year 2019;

(ae) there has been no investigation by the MACC on the guard house at the residential area of the accused as well as on the existence of the CCTV at his house; and

(af) SP3's credibility is at stake as the prosecution had failed to produce the *fail meja*. Moreover, her narrative was not proven by the prosecution, she being a material witness for their case.

FINDINGS BY THIS COURT

[63] On a curial scrutiny of the record of evidence available this court finds the following:

(a) evidence of SP2 lends credence to the evidence of SP3.

(b) SP3 paid the sum of RM200,000 to the accused, after having obtained assistance from SP2;

(c) SP2's evidence remained unrebutted until conclusion of trial;

(d) SP3's attendance at the wedding reception of the son of the accused's renders it probable that the accused knew SP3;

(e) payment made was for the contract works awarded to SP3, which is proved by existence of salient contract documents, like the work permit and certificate of progress payments which was approved by the accused;

(f) defence witness SD2, confirmed in his testimony during cross-examination that the accused has power to award the job or contract works to DNSB. Thus, the finding of the SCJ was against this evidence, culminating into misdirection on her part;

(g) evidence of DWs, SD3 and SD5 supports the testimony of SD2. According to SD3 and SD5, the accused has the full power to appoint a

contractor for the works and also to appoint a contractor of his choice whom to his mind is able and appropriate to carry out the contract works. Hence, he is in a position of authority to approve and award the impugned contract works; and

(h) amendment made to the charges does not matter a jot. Since the first amended charge only relates to payment for a work permit, the issue on the three work permits does not arise anymore and as the second charge was amended to state that the bribe was for the same project as for the first charge, it was materially unnecessary for production of any documents pertaining walkway contract at Lorong Ceylon.

[64] On the value of SP2's testimony, the following could be discerned from the totality of the evidence available:

(a) he had loaned the monies RM200,000 to SP3 in order to pay the accused;

(b) he travelled with SP3 to pay the gratification to the accused;

(c) he drove SP3 to meet the accused at treats shop and also residence of the accused;

(d) he drove SP3 by using Waze for direction to the accused's house;

(e) saw SP3 parting with the monies to the accused and SP3 had returned to the car without the monies after meeting the accused; and

(f) both SP2 and SP3 knew of the red Honda HRV belonging to the accused and driven by him when he was at the site for contract works where SP2 was also present.

[65] His testimony shows consistency and it cannot be a story that had been conjured up, as it is a vivid description of the meeting of SP3 with the accused. SP2 too was the direct beneficiary of the works to be procured by SP3 from the accused as he was the subcontractor for the said contract works. It fits in as direct evidence pursuant to s 60(1)(a) and (c) of the EA.

ISSUE ON MOTIVE

[66] The SCJ had concluded that SP3 and SP2 had an ulterior motive to implicate the accused by testifying falsely against him to set him up against the law. To that the SCJ ought to have considered the applicable law very carefully before concluding so. The law is found in the case of *Goh Han Heng v Public Prosecutor* [2003] SGHC 226; [2003] 4 SLR 374 which was followed by our COA in the case of *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98; [2018] 1 LNS 135. The case of *Goh* was decided by Yong Pung How CJ as follows which was appropriately referred to in the written

submission by the learned DPP:

> ... where the accused can show that the complainant has a motive to falsely implicate him, then the burden must fall on the prosecution to disprove that motive. This does not mean that the accused merely needs to allege that the complainant has a motive to falsely implicate him. Instead, the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive a constituent element of every offence.

ISSUE ON THE PAYMENT OF GRATIFICATION

[67] The decision in the case of *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 resolves the issue, where it was decided that:

> It is not incumbent on the prosecution to prove that the money was found in the possession of the appellant so long as the trial court is satisfied from the evidence that it was the appellant who received the money.

So was also the decision by HCJ1, when he decided to reverse the order of discharge and acquittal of the accused at the end of the case of prosecution by the SCJ, and had ordered for her to hear the case of the defence by the accused person.

ISSUE ON ACCOMPLICE

[68] The SCJ had decided that SP2 was an accomplice and that his evidence lacks corroboration and the complainant SP3's evidence could stand alone. What is her basis? This error of law persisted in the judgment of the SCJ from the case of the prosecution until conclusion of the trial. In deciding so, the SCJ had relied on the High Court decision in the case of *Dato' Haji Azman bin Mahalan v Public Prosecutor* [2007] 4 MLJ 142, where it was decided that the main witness in that case was an accomplice whose evidence lacks corroboration. The effect of that finding caused the conviction entered by the SCJ in that case to be reversed to an acquittal. Due to lack of caution, the SCJ in the present case had misconstrued the law, when she did not refer to the decision of the COA in the case of *Public Prosecutor v Dato' Hj Azman bin Mahalan* [2010] 6 MLJ 833; [2010] 6 CLJ 34, which had overruled the decision of the High Court and decided that an accomplice is a competent witness and regardless of his status, due to the abundance of evidence to substantiate his evidence regarding gratification payment, we were satisfied that the prosecution had successfully established a prima facie case for the first charge. Also, in that case the COA when referring to s 44 of the

Anti-Corruption Act 1997 (which is *pari materia* with the present s 52 of the MACC Act) had decided after referring to authoritative sources of reference as in *Bindra's Interpretation of Statutes,* that the primary duty of the court is to give effect to the intention of the Legislature in the words used by it. If the words of the statute are in themselves precise and unambiguous, then no more is necessary that to expound those words in their natural and ordinary sense, as the words themselves alone in such case best declare the intent of the law giver. Further Suffian LP in the case of *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1980] 1 MLRA 3, which stands relevant had decided:

> ... the words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v Sirs* seems to me to be particularly apt for: the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. *Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* (Emphasis added.)

The SCJ by not following the plain and unambiguous words in s 52 of the MACC Act is found to have invented fancied ambiguity in the language of that provision, so as to suit her ultimate decision to discharge and acquit the accused person at the end of his trial.

[69] Another decision which decided the same after citing s 44 of the Anti-Corruption Act 1997, is the decision of the apex court in the case of *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429, where it finally nailed the coffin by deciding that n*o giver could be regarded as an accomplice*. Such, shall also be the position in the present case, *vis* the position of SP2 and SP3 in the case against the accused.

[70] Likewise, in the present case, s 52 of the MACC Act is applicable on all fours to the testimony of SP2 and SP3, by virtue of which they are not accomplices to the crime for the following reasons:

(a) they were not *particeps criminis*;

(b) SP3 had approached the accused for job assignments cum contract works for and on behalf of DNSB, as they were not given any, after waiting for a long time;

(c) she had approached the accused, as he was in a position of authority to decide on the choice of contractors, including SP3 and DNSB;

(d) at the meeting, it was the accused who had indicated to SP3 at his office at DBKL that he expects a 'sponsorship' which was well understood by

SP3 that a payment of a sum of money was expected by the accused, which would render a swift approval of the contract for works to her advantage;

(e) such being the plane, SP3 who was more interested in securing the contract works with DBKL had readily planned with the accused to pay him a sum of cash as gratification;

(f) hence, the payment of RM200,000 in two tranches, one at the treats shop at Petron and another at his residence;

(g) SP3 was financially strapped at that point of time, thus she had sought assistance from SP2 to loan him monies so that he could pay the sum of gratification to the accused;

(h) SP2 in turn readily agreed to loan the amount of monies and had in fact drove SP3 to the destination as agreed with by her and the accused;

(i) SP2 had vividly testified on the loan of monies, the carrying of the monies by SP3 in the car driven by SP2 and after having parted with the said monies to the accused, SP3 had returned to SP2's car;

(j) when the contract for works was awarded, SP2 was the greatest beneficiary as he was the subcontractor for the said works, as agreed to by SP3; and

(k) Such, is the scenario which has to be believed by the SCJ in the absence of any cogent basis not to do so, and also that HCJ1 had decided that the gratification was indeed paid corruptly to the accused, thus the presumption of law under s 50(1) of the MACC Act shall apply.

[71] Albeit, the SCJ chose not to believe both SP2 and SP3 and questioned once again at the conclusion of trial, that there is no reason for the accused to have received such gratification as by passage of time, SP3 would have been able to procure the job assignments cum contract works from DBKL. This was despite the fact that HCJ1 had found that when she made that finding at the end of the case of prosecution she had fallen into an error of fact as it was made against the weight of evidence, being that only after the said monies was paid to the accused corruptly as gratification, the job assignments were awarded to SP3 and DNSB.

[72] In view of the above, how could SP2 be labelled as an accomplice, when he with SP3 have their intention to have the contract works for themselves secured from DBKL. It was the accused whom had encouraged SP3 to gratify him with corrupt monies, thus he had benefited from the relationship he had had with SP3 with an ulterior motive, as revealed by the uncontroverted evidence. At all material times, there is overwhelming evidence against the accused that SP3 had acted on the instruction of the accused, for sponsorship,

which had remained uncontroverted from the inception of the case of prosecution until conclusion of the trial (see by analogy the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150). One has also to be mindful of the law that the credit of any witness, including SP2 and SP3 in the present case, depends on the facts of the case and not upon the particular label which is attached to them, like so by the SCJ on to SP2 (see the case of *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71).

CONCLUSION

[73] In the premise, there has been material errors committed by the SCJ when arriving at her findings at the conclusion of the trial and also misdirection on the evidence proffered in the case for the following reasons:

(a) when arriving at her finding at the end of the case of defence, she did not pay heed to the order of HCJ1 that a prima facie case has been established and therefore she has to only consider the defence of the accused vis presumption of law pursuant to s 50(1) of the MACC Act;

(b) she has further erred when she did not consider the law that in view of the presumption applicable against him, the accused bears a higher burden of proof to rebut the said presumption on a balance of probabilities;

(c) a salient fact demonstrating it, being that a defence of bare denial or an afterthought does not at all displace the presumption of law on a balance of probabilities bestowed on him to displace as the law demand for him to adduce fresh evidence or evidence to the contrary in order to rebut the said presumption;

(d) an error of law was committed by the SCJ when she misdirected herself on the applicable law pertaining evidence of SP2 and SP3 whom shall not be regarded as an accomplice pursuant to s 52(1)(a) of the MACC Act. It (the salient part) as the rule of law prevails, which renders that:

> Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act —
>
> (a) No witness shall be regarded as an accomplice by reason only of such witness having —
>
> (ii) given any gratification.

(e) although SP3 who was giver of the bribe, it came about because of the demand made by the accused for a sponsorship when SP3 went to see him to complain that she has not obtained the contract for works yet. SP2 was merely ferrying SP3 to the port of parting with the gratification to be paid to the accused and he was the person who had loaned the monies to SP3 in order to corruptly gratify the accused person. The law

as found in the MACC Act recognises that albeit them knowing the purpose for which the corrupt monies were paid, they are still credible witnesses and the trial court when evaluating their testimony has to embark on the same footing like that of any other witness, provided their evidence on all fours is credible, reliable and believable in accord with the facts and circumstances of the case in its entirety.

[74] Flowing from the above, findings made by the SCJ are unsupported by the proffered evidence in the case. Hence, her ultimate decision at the conclusion of trial is against the weight of evidence. There has been improper judicial evaluation of the evidence. On the law, there has been erroneous finding on the law, *to wit,* misapplication of the case of *Azman bin Mahlan;* misconception on the intent and purport of s 52 of the Act 694; non-application of the case of *Khir Toyo.*

[75] Therefore, pursuant to s 17(a) of the MACC Act, the accused in his capacity as a public official with DBKL cum agent of his principal DBKL was entrusted to carry out DBKL's affairs faithfully for the benefit and advantage of DBKL, the country as a whole, public at large and not for any specific individuals. The prosecution was successful in proving beyond reasonable doubt that the accused had abused his position by acting to his own advantage, by receiving pecuniary benefit as inducement for him to approved the contract for works to SP3 who was representing the entity DNSB. Thus, in law, he has committed offences of corruption. The equity and fairness of the law is enshrined in s 50(1) of the MACC Act, catering for a presumption that if he had received the said pecuniary benefit or gratification corruptly, he could rebut it with cogent evidence in his favour. His duty under the law is to prove to the contrary that he did not receive the said pecuniary benefit corruptly. In doing so, he shall not merely raise a reasonable doubt but he has to satisfy the court on a balance of probabilities by adducing contrary evidence to the proven case of the prosecution, that he did not receive the amount of RM200,000 from SP3 corruptly. The explanation and/or defence he offers to the court via his testimony and witnesses, shall not be a mere denial or an afterthought that the act of bribery did not take place and also that there is no basis or reason for it to have taken place, as he does not know the complainant SP3 or the work process entailing award of contract for works by his principal DBKL is water tight wherein strict compliance is the mainstay and also that he has no authority to approve the contract for works to DNSB. In view of the bare denial and afterthought explanation by the accused, the fact that DNSB was awarded the contract for works after the gratification was paid by SP3 to him stands uncontroverted. Thus, the presumption of law applicable against him also remains unrebutted.

[76] In sum total, by virtue of the errors and misdirection by the SCJ,

appellate intervention is justified for this court to correct it on appeal. On that score, this court decides to allow the appeal by prosecution, thus setting aside the order of discharge and acquittal and substitute it with a finding of guilty and conviction on the two charges preferred against him under s 17(a) of the MACC Act, pursuant to s 316(a) of the CPC.

SENTENCE

[77] Thereafter, this court heard the mitigation by the accused via his counsel which is as follows:

(a) on the law:
the offences under s 17(a) of the MACC Act, punishable under s 24(1) of the same Act, provides for a maximum imprisonment of twenty years and a fine of not less than five times of the sum of gratification paid. Therefore, the maximum fine allowed by law in the present case would be an amount of RM1m, which is five times RM200,000;

(b) personal factors:
the accused is 62 years old and had prayed for a day imprisonment on the ground that he had an exemplary background, as a Senior Deputy Director on Grade 54, when he was at DBKL. He had more than 35 years' experience. As contribution to DBKL, he was involved in the rain water harvesting system in the City of Kuala Lumpur. He had also received an excellent service award, when he was serving DBKL, where he had served for about 37 years. He is retired, since 31 January 2022. Prior to his retirement, as the criminal cases were pursued against him, he had been interdicted for almost four years;

(c) status:
the accused is a first offender in the eyes of the law, without even a smear blackmark. As of now he is on suspension by DBKL with half salary and it has been four years. He is constrained financially and also deprived of the use of his gratuity;

(d) health condition:
currently, he is suffering from poor health. He has high blood pressure, and he suffers blackout occasionally. He had undergone four major surgeries. He has arthritis in both knees, thus on a very strong medication and to go through a strict diet control. He had total knee replacement on his left knee and currently scheduled for a right knee replacement. He is unable to walk and stand properly, thus requiring a wheel chair and walker. He also needs assistance when going to the toilet. He is on a constant treatment regime at the hospital. Also undergoes frequent physiotherapy. As such, his health will deteriorate, if he has to suffer long period of incarceration; and

(e) prayer:
for both the charges, accused has prayed for a concurrent sentence to be meted out as although it involves two different dates, but the complainant is the same. The total amount involved is RM200,000. A minimum sentence of imprisonment and a fine of RM1m is prayed for.

[78] Submission on the aggravating factors by the DPP and reply by DC are as follows:

> At the outset, the DPP had gracefully conceded that the prosecution would not object to a stay of execution of the sentence pending appeal to the Court of Appeal. On the sentence of one day imprisonment prayed for by the accused is contended to be a mockery of the system of administration of criminal justice. It was further submitted that the accused had well-planned the crime, whereby the complainant had gone to see him for a favor. He had requested from the complainant sponsorship for Hari Raya celebration. By doing that, he had breached the entrustment placed on him by DBKL, his principal. He had taken advantage of his official function to satiate himself financially. Any sentence meted out by this court has to reflect public interest and the public at large ought to know that the court is serious when meting out an appropriate sentence on the accused person. A term of imprisonment for a period between five to ten years was prayed for by the prosecution.

[79] Reply by the accused via his counsel is again on his health condition as alluded to above. After having heard the plea in mitigation by the accused and submission on the aggravating factors by the DPP, this court has to decide on an appropriate sentence to be meted out on the accused which has to be proportional to the crime committed by him.

[80] On appeal, the accused who is respondent to this appeal is found guilty and convicted for the offences stipulated in the two amended charges preferred against him. Both charges are for corruption offences vis abuse of position by the accused to gratify himself financially. The amount involved is to the tune of RM200,000. For each of the offences, the law only provides for a maximum sentence of 20 years imprisonment. To deal with the offences further, the law also imposes a penalty to be paid by the accused adding up to five times of the amount of corrupt proceeds ill-gotten by the accused. In this case the total amount is RM200,000.

[81] The learned counsel for the accused has advanced a thorough submission forming his plea in mitigation to this court gravitating towards a lenient sentence and on the other hand the learned DPP advanced his noteworthy submission on the aggravating factors, emphasising on the mode and manner by which corruption offences are to be treated by this court via sentencing and it has to be abhorred at all costs.

[82] The plea in mitigation put forward is in the main pointing towards personal factors of the accused, including his career advancement at DBKL where he rose to be a senior official with vast experience and many accolades. Pointedly the plea in mitigation is also on his medical condition and the ultimate is that he is on wheel chair and a longer time of incarceration in prison would not favor his health any better, thus a prayer was made for a very lenient sentence, including a day imprisonment. The penalty amount to be paid by the accused remains undisputed as it is so rooted in the law.

[83] This court in arriving at a decision on the sentence has to consider the plea in mitigation advanced by the accused via his counsel as well as the aggravating factors advanced by the prosecution in its entirety, carefully as well as on a reasonably balanced basis, wherein the aim to be adhered to when sentencing the accused shall take precedence.

[84] In the present case, the aim shall be deterrence, both specific to the accused to prevent him from re-offending as well as general to deter others who are in a similar advantageous position if mindful of abusing it shall not do so by attempting such crimes of corruption. On that score, any sentence meted out by this court has to reflect deterrence and the abhorrence by the public at large to the crime of corruption. Essentially, public interest ought to also prevail when this court decides on an appropriate sentence according to law.

[85] On that score, the penal policy of the Legislature to constantly and consistently update corruption law must be always appreciated. Also considered is the conduct of the accused who had abused his official position to extend favor for a pecuniary benefit which clearly has the effect of eroding the faith of the people in the public delivery system, specifically at DBKL. If such crimes are not deterred to the core, it has the effect of creating a void in the Rule of Law, being the highest tenet of our constitutional jurisprudence. Public officials must be told not to obviate and breach the operating procedure stipulated for them to follow and adhered to all costs, specifically on award of contract for works cum job assignment, and not to gratify themselves corruptly, thus side-stepping the set procedure of operations. It does not only mar the reputation of the public officials but also the public delivery system, which would be crippled when the rules of procedure and stipulations are breached to satiate oneself financially. The members of the public must also be told to comply with the operating procedure and not to take short cuts by cutting the queue and be givers in order to obtain and enjoy a favor for themselves by corruptly gratifying public officials in position of authority. Such advantage taken by the public would only cripple the public delivery system further.

[86] After having considered all the conceivable factors, this court sentences the accused to the following:

(a) *for the first charge*: a sentence of imprisonment for a period of four years;

(b) *for the second charge*: a sentence of imprisonment for a period of four years;

(c) *penalty* for the corrupt amount received, which is the amount of RM200,000, to be five times of that amount, adding up to RM1m;

(d) non-payment of the penalty sum would lead to a *default sentence* for an additional period of four years imprisonment, pursuant to the stipulation guide in s 283 of the CPC;

(e) all terms of imprisonment ordered by this court is take effect *concurrently*; and

(f) but the default term of imprisonment for non-payment of penalty is to run *consecutive* to the term of four years imprisonment ordered by this court.

[87] As stay of execution of the sentence pending appeal is agreed to gracefully by the prosecution, it is granted pending appeal against the finding of guilty, conviction and sentence by this court to the Court of Appeal pursuant to s 311 of the CPC. I also take this opportunity to thank all parties to this proceeding who have handled the case professionally and to their utmost best, which had assisted this court a great deal in order to arrive at a fair and just decision.

Appeal allowed. Accused convicted and sentenced according to law.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh